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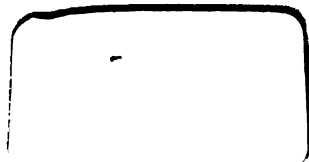
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H A N D B O O K

OF THE

LAW OF PUBLIC CORPORATIONS

By HENRY H. INGERSOLL, LL. D.
DEAN OF THE UNIVERSITY ^{OF} TENNESSEE SCHOOL OF LAW

ST. PAUL, MINN.
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TO THE

HONORABLE JOHN F. DILLON,

**Author of Commentaries on the Law of Municipal
Corporations, as a token of the author's admiration
for the profound learning, judicial spirit, unwearied
industry, and civic patriotism manifest therein,**

THIS VOLUME IS RESPECTFULLY DEDICATED.

(v)*

PREFACE.

THIS handbook is the result of the author's labors to succinctly state and plainly illustrate the doctrines and rules of the Law of Public Corporations, as declared in the decisions, concurring, variant, and conflicting, of the State and Federal Courts of America. The author gratefully acknowledges his obligations to Judge Dillon for his pioneer labors on the subject of Public Corporations, and also to the work of Prof. Tiedeman, Judge Elliott, and Messrs. Beach and Smith in the same field.

In the first hundred pages are treated Quasi Corporations. Municipal Corporations occupy the next four hundred pages. The residue of the volume is devoted to Quasi Public Corporations.

Though designed specially for the use of students, the author's experience on the bench and at the bar persuades him that the work will be welcome to practitioners for its concise statement of principles as well as its full citation of important cases, many of them recent and some decided during the current year. For discriminating aid in this part of the work, the author acknowledges obligation to Leonard J. Collins, Esq., of the Knoxville bar.

HENRY H. INGERSOLL.

Knoxville, Tenn., October, 1904.

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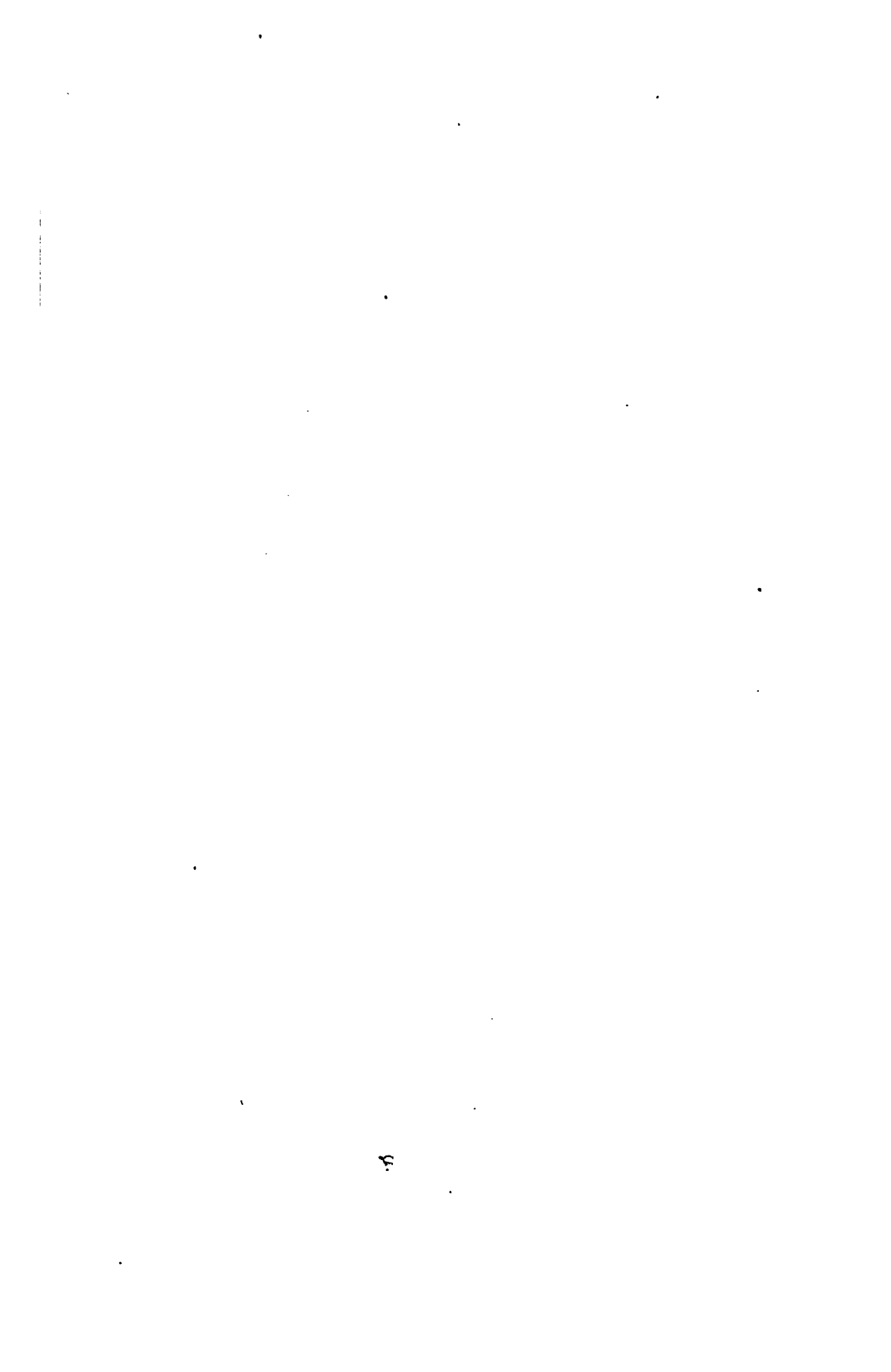
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HANDBOOK

OF THE

LAW OF PUBLIC CORPORATIONS.

Part I.

QUASI CORPORATIONS.

CHAPTER I.

NATURE, CREATION, CLASSIFICATION.

- 1. Corporations in General.**
- 2. Various Kinds.**
- 3. Nature of Corporations.**
- 4. Public Corporations—Definition.**
- 5. Classification.**
- 6. Legislative Sanction—Origin.**

CORPORATIONS IN GENERAL.

- 1. The nature of a corporation is set forth in the following standard definitions from acknowledged authorities:**
 - (a) "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." ¹**
 - (b) "It is a legal institution devised to confer upon the individuals of which it is composed powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity or unity, and perpetual or indefinite succession under the corporate name, notwithstanding suc-**

¹ Chief Justice Marshall in the celebrated DARTMOUTH COLLEGE CASE, 4 Wheat. (U. S.) 518-675, 4 L. Ed. 629, wherein the nature of corporations was elaborately considered, and it was established that the charter of a private corporation was an inviolable contract, under the Constitution of the United States, art. 1, § 10.

cessive changes, by death or otherwise, in the corporators or members." ²

- (e) "It is a collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form, and invested by the policy of the law with the capacity of acting in several respects as an individual—particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or of the powers conferred upon it either at the time of its creation, or at any subsequent period of its existence." ³

The three foregoing statements of the nature and qualities of a corporation are the ones most familiar to the modern student of corporations. The first is by the great Chief Justice, and gives terse expression to the fundamental ideas of a corporation. It is not a natural, but an artificial, being or person; it cannot be seen, nor touched, nor recognized by any other human sense; it is a creature of the law, existing only by its authority,⁴ and recognized and respected by it alone.

The second definition is by the recognized master of the law of municipal corporations in America.⁵ It is fuller, more comprehensive, and more satisfactory to the lawyer. It calls at-

² Judge Dillon, in volume 1, § 18, *Commentaries on Law of Municipal Corporations* (4th Ed.)—the standard textbook on that subject.

³ 1 Kyd, *Corp.* 13—a work which has held high repute for a century in both England and America.

⁴ Agreement of members cannot alone make a corporation; the express consent of the state is necessary. *Clark, Priv. Corp.* §§ 4, 12-18; 1 *Thomp. Priv. Corp.* § 35; *Hoadley v. Commissioners*, 105 Mass. 526; *Stowe v. Flagg*, 72 Ill. 397; *Franklin Bridge Co. v. Wood*, 14 Ga. 80.

⁵ Judge Dillon's *Commentaries on the Law of Municipal Corporations*, published originally in 1872—the first American work on this subject—came instantly into professional and judicial favor, and has so constantly and universally maintained it as to be justly entitled to be called "authority."

tention not only to the characteristics emphasized by Chief Justice Marshall in his vivid and sententious definition, but also to other characteristics, viz.: It is composed of individuals;⁶ it has powers, privileges, and immunities not common to natural persons;⁷ the members may die, but the corporation continues as a perpetual unity unaffected by their death.⁸

Still fuller and yet more satisfactory than either of the American definitions is that of the great English author, Kyd, the earliest writer in our language upon this topic. Judges, professors, and practitioners have generally united in commending this as a most accurate, practical, and complete definition, and remarkable as found in the first treatise on the subject. In addition to the ideas of this artificial person found in the other definitions, Mr. Kyd has herein specified the chief powers of a corporation,⁹ such as the taking and holding and transferring of property, the contracting of obligations and transaction of business, the suing and being sued like a natural person; the idea of certain powers, privileges, and immunities adapted to its object; and the specific purpose of its creation.

⁶ 1 Thomp. Priv. Corp. § 7; Clark, Priv. Corp. § 1, Append. p. 644; 1 Coke, Inst. 202, 250; 2 Kent, Comm. 267, 268; *People v. Watertown*, 1 Hill (N. Y.) 620; *Hightower v. Thornton*, 8 Ga. 492, 52 Am. Dec. 412. The corporation sole, a favorite of English courts for the protection of the crown and of ecclesiastics, has been recognized in several of the United States. *Day v. Stetson*, 8 Me. 365; *GOVERNOR v. ALLEN*, 8 Humph. (Tenn.) 176; *Inhabitants of First Parish in Brunswick v. Dunning*, 7 Mass. 447; *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288, 21 Pac. 830; *Jansen v. Ostrander*, 1 Cow. (N. Y.) 670; *McCloskey v. Doherty*, 97 Ky. 300, 30 S. W. 649. But corporations sole are rare in America, and not increasing in number or favor.

⁷ Lord Coke, reporting the opinion of Manwood, C. B., says: "They are invisible, immortal, having no conscience or soul." And in our day the responsible members are not liable personally.

⁸ 1 Thomp. Priv. Corp. § 10; Clark, Priv. Corp. § 15; *State v. Stormont*, 24 Kan. 686; *Fuller v. Academic School*, 6 Conn. 543; *Fairchild v. Association*, 71 Mo. 526.

⁹ These are sometimes distinguished as essential attributes and non-essential incidents. Clark, Priv. Corp. §§ 6, 7.

VARIOUS KINDS.

2. Primarily all corporations are divided into two great classes, public and private; public being those created for the public use, and private being created for private objects.

Another class, known as quasi public corporations, combines the elements of both public and private. Though organized for private profit, they are compelled by law or contract to render public service.

Blackstone divided corporations¹⁰ into aggregate and sole, according to the number composing the body; into ecclesiastical and lay, according to the character of the persons composing them; and into civil and eleemosynary, according to the uses they were intended to subserve; and this classification is still generally recognized and utilized in England. But it is not profitable for us to discuss whether the division is now exactly correct in theory, for certainly it is of little present practical use in America.

Public and Private Corporations Distinguished.

The distinction between public and private corporations is not only of theoretical interest, but of great practical importance. Upon this pivot is often made to turn the liability of the corporation for the torts and contracts of its agents, and the powers and privileges of the body. Nor is the subject free from difficulty, either upon reason or authority. It is easy to understand that counties, cities, and towns, and other public bodies upon which the legislature has conferred definite powers, to be exercised for public purposes only, are public corporations; but whether banks, colleges, schools, and hospitals, designed and operated for the public welfare, are public or private, is matter of disagreement in our American courts; and there are decisions which declare a municipal corporation to have a private char-

¹⁰ 1 Bl. Comm. 469-471.

acter,¹¹ and others holding railway companies and grain elevators to be public corporations *quoad hoc*.¹²

It is declared by the Supreme Court of Georgia that "a bank organized by the government for public purposes is a public corporation if the whole of the stock and all interest in it reside in the government."¹³ But the three neighboring states of North Carolina, South Carolina, and Alabama, by their Supreme Courts, declared the contrary doctrine;¹⁴ and to this view the United States Supreme Court inclines in at least two cases.¹⁵ In the matter of schools and colleges the law was declared by that tribunal in the celebrated Dartmouth College Case, in 1819, to be that a corporation is not necessarily public because it has been established for the purpose of general education or charity. If the foundation be private, though under government charter, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution; and so, if the making of profit is the purpose of a corporation, it is

¹¹ BAILEY v. NEW YORK, 8 Hill (N. Y.) 531, 38 Am. Dec. 669; Macauley v. New York, 67 N. Y. 602; City of Memphis v. Kimbrough, 12 Helsk. (Tenn.) 183; OLIVER v. WORCESTER, 102 Mass. 489, 3 Am. Rep. 485; Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347; PEOPLE v. DETROIT, 28 Mich. 228, 15 Am. Rep. 202.

¹² MUNN v. ILLINOIS, 94 U. S. 113-126, 24 L. Ed. 77; CHICAGO, B. & Q. R. CO. v. IOWA, 94 U. S. 155, 24 L. Ed. 94; Peik v. Railroad Co., 94 U. S. 164, 24 L. Ed. 97. These are commonly known as the "Granger Cases," in which was maintained and enlarged the old legal doctrine enunciated by Lord Hale, that, "when private property is affected with a public interest, it ceases to be *juris privati* only." 1 Harg. Law Tracts, 78. It has also been applied to water companies, Spring Valley Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; and to gas companies, State v. Gas Co., 37 Ohio St. 45.

¹³ Cleaveland v. Stewart, 3 Ga. 283.

¹⁴ State Bank v. Clark, 8 N. C. 36; Bank of State v. Gibbs, 3 McCord (S. C.) 377; Bank of State v. Gibson's Adm'rs, 6 Ala. 814, 816.

¹⁵ Bank of U. S. v. Bank, 9 Wheat. (U. S.) 907, 6 L. Ed. 244; Bank of Kentucky v. Wister, 2 Pet. (U. S.) 318, 7 L. Ed. 437.

a private corporation, though it may be engaged in the service of the public.¹⁶ In the *Planters' Bank* case, above cited, the State of Georgia was both the proprietor and a corporator of the bank, but not the exclusive owner. In the *Kentucky Bank Case*, the state was not a corporator, but was the exclusive owner of the stock of the bank. In both cases the bank was held by the Supreme Court of the United States to be a private corporation. The conflict in these decisions on the subject of banks doubtless results from the application to stock corporations of the remarks of the Justices of the Supreme Court of the United States, in the *Dartmouth College Case*, upon the qualities and attributes of public and private corporations, which were intended to be applied only to nonstock corporations, such as was *Dartmouth College*, where private profit was not the object of the corporation.

The decided preponderance of authority is that, where profit-making is the object of the corporation, it is private;¹⁷ if it perform public functions, engage in public service, or exercise any sovereign power, it becomes a quasi public corporation.¹⁸

¹⁶ *TEN EYCK v. CANAL CO.*, 18 N. J. Law, 200, 37 Am. Dec. 233; *MINERS' DITCH CO. v. ZELLERBACH*, 37 Cal. 543, 99 Am. Dec. 300; *People v. Forrest*, 97 N. Y. 97; *Commonwealth v. Gaslight Co.*, 12 Allen (Mass.) 75.

¹⁷ *Clark, Priv. Corp.* 29; 1 *Thomp. Priv. Corp.* §§ 24, 27. Corporations are private if created for private gain, even though supposed by the legislature to promote the public interest. 1 *Dill. Mun. Corp.* § 53.

¹⁸ *Tinsman v. Railroad Co.*, 26 N. J. Law, 148, 69 Am. Dec. 565; *Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318; *TEN EYCK v. CANAL CO.*, 18 N. J. Law, 200, 37 Am. Dec. 233; *Whiting v. Railroad Co.*, 25 Wis. 167, 3 Am. Rep. 30; *Logwood v. Bank*, Minor (Ala.) 23. Every stock corporation is a private corporation, though it be quasi public because of its functions, as a railroad or a canal company. So, also, are nonstock corporations erected upon a private foundation, though their functions are public. *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

Quasi Corporations.

In America a certain class of corporations are described as quasi corporations, by which is intended to express that the bodies so described are loosely organized, and possess only a part of the usual corporate powers and attributes. Quasi corporations represent the lower order of corporate life, and vary in their functions according to the purposes which they are intended to serve. Such are counties, townships, school districts, and the like.

For a full statement and explanation of the various kinds of private corporations, the reader is referred to Clark on Private Corporations, §§ 10, 11.

NATURE OF CORPORATIONS.

3. A corporation aggregate, whether public or private, consists of

(a) A collection of natural persons.

(b) A legal body including those persons, and yet separate and distinct from them, endowed by law with certain rights, powers, and franchises.

To avoid the confusion often arising in the minds of persons inexperienced in the practical operation of a corporation, it is of first importance that the legal body, existing only in contemplation of law, shall be kept separate and distinct from the persons of the members composing it.¹⁹ The corporation cannot exist without members. Human beings, with minds and souls, to organize, establish, control, direct, and use the powers which the state confers upon the corporate body, are essential to its existence. Until the persons authorized have breathed the breath of life into the body of the charter, there is no corporation.²⁰ If the members all die or remove from the territory, leaving no successors to exercise these powers or maintain these

¹⁹ Clark, *Priv. Corp.* §§ 5-9.

²⁰ *State v. Dawson*, 16 Ind. 40; *Willis v. Chapman*, 68 Vt. 459, 85 Atl. 459; *Yeaton v. Bank*, 21 Grat. (Va.) 593; *Ellis v. Marshall*, 2 Mass. 269, 3 Am. Dec. 49. There must be an acceptance of the

rights, the corporation is at an end.²¹ The charter is a separate, distinct, and necessary part of the organism, but it is not the corporation. The persons authorized by law to assume its rights, powers, and franchises are equally essential to its existence. But until the two have been united by the action of the persons under and within the powers of the charter, the corporation is only a potentiality. After the union of the two, and as long as the charter and members both live, the corporation exists.²² The members exercise the corporate powers and hold the corporate property and perform the corporate functions in the corporate name, and the corporation is said to be a "going concern." But with either the death of all the members or the loss of the charter the essential union of members and body is dissolved, and the legal fiction is at an end; the corporation no longer exists.²³

Termination—Members.

The charter may expire of its own limitation, or it may be terminated by an act of the law, legislative or judicial;²⁴ the individuals composing the corporation may terminate their relation to it by death, surrender, or severance of membership, and, the life being out of the legal body, nothing but the dry shell remains.²⁵ And yet, essential as these two parts are to the

charter before corporate life can begin. *Smith v. Mining Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

²¹ 1 Bl. Comm. 485; *Chesapeake & O. Canal Co. v. Railroad Co.*, 4 Gill & J. (Md.) 1; *Arthur v. Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; 2 Kent, Comm. 308, 309; *Lehigh Bridge Co. v. Navigation Co.*, 4 Rawle (Pa.) 9, 26 Am. Dec. 111; *Phillips v. Wickham*, 1 Paige (N. Y.) 590.

²² *Smith v. Mining Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; *People v. Watertown*, 1 Hill (N. Y.) 620; *PARKER v. HOTEL CO.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Clark Priv. Corp.* §§ 5, 6; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473.

²³ *Bacon v. Robertson*, 18 How. (U. S.) 480, 15 L. Ed. 499; *Mason v. Mining Co.*, 66 Fed. 396, 13 C. C. A. 532.

²⁴ 1 Dill. Mun. Corp. §§ 165, 169.

²⁵ *People v. Wren*, 4 Scam. (Ill.) 275; *Smith v. Smith*, 3 Desaus. (S. C.) 557.

corporate existence, the body and its members have also, in the view of the law, a separate and distinct existence. In its relations with other persons and with the state, in the exercise of its powers and control of its property it is only the corporation that acts; everything is done in the corporate name; the obligations contracted, the liabilities incurred, the conveyances made, the functions exercised, are all in the name of the corporation; and thus it is an artificial person.²⁶ But the individual members, though essential to the corporate existence, do not own the property, do not make the contracts, do not commit torts, nor incur the liability of the corporation.²⁷ They retain their own separate personality; each one is a separate and distinct person, with no corporate power, franchise, or property vested in him. It is the collective body of corporators having the right to these powers and franchises and this property of the corporation, that control, govern, and direct its operation.²⁸ However powerful in thought, will, or money any one member may be—however dominant his influence and habit—he is not the corporation; and, even though it should happen that he own every share of stock or every acre of land in it, he could not in his own name convey any portion of the corporate property; and the corporation may sue one of its own members, and the member may sue the corporation, on either

²⁶ *PARKER v. HOTEL CO.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Williamson's Syndics v. Smoot*, 7 Mart. O. S. (La.) 34, 12 Am. Dec. 494; *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

²⁷ *Clark, Priv. Corp.* §§ 558, 559, 564, 565. But in two notable cases involving the "corporation trust questions" the courts of New York and Ohio have pronounced judgment against corporations for wrongs done by the members. *PEOPLE v. SUGAR REFINING CO.*, 121 N. Y. 582, 74 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *STATE v. OIL CO.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.

²⁸ *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; *Durfee v. Railroad Co.*, 5 Allen (Mass.) 230, 242; *Dudley v. High School*, 9 Bush (Ky.) 578.

contracts or torts, even though they affect or concern the affairs of the corporation.²⁰

Corporate Unity.

And yet, separate and distinct as the members and the body are, the members are one; and that one is the corporation.

"The most peculiar and strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial, individual existence."²¹ This quality is aptly expressed by Blackstone in the following simile: "All the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law—a person that never dies; in like manner as the river Thames is still the same river, but the parts which compose it are changing every instant."²² In a leading New York case it was declared by Chief Justice Nelson "that the essences of a corporation consist in a capacity to have perpetual succession, and a special name and an artificial form, to take and grant property, contract obligations, sue and be sued by its corporate name as an individual, and to receive and enjoy in common, grants, privileges, and immunities."²³ These expressions used generically in regard to corporations are especially applicable to private corporations; and yet, as we shall see hereafter, the same general principles and rules may apply to both classes.

²⁰ *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75; *Waring v. Catawba Co.*, 2 Bay (S. C.) 109; *Rogers v. Society*, 19 Vt. 187; *Lexington Life, Fire & Marine Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

²¹ *Warner v. Beers*, 23 Wend. (N. Y.) 103.

²² 1 Bl. Comm. 468.

²³ *THOMAS v. DAKIN*, 22 Wend. (N. Y.) 9. C. f. *Southern Pac. R. Co. v. Orton* (C. C.) 32 Fed. 457.

PUBLIC CORPORATIONS—DEFINITION.

- 4. A public corporation is a corporation created by the state for public purposes only, as an instrumentality to increase the efficiency of government, supply the public wants, and promote the public welfare.**

This class of corporations includes not only the municipal corporation, but also agencies of government, called "quasi corporations," whose objects are not the making of private profit nor supplying the wants of the members.³³ All corporations are supposed to be created for the public good; otherwise the legislature, acting for the public, would not enact laws to bring them into existence; and formerly the popular idea was that the public is interested in every corporation created by it through its legislative authority. The members of a corporation were supposed to be able and willing to return something to the state in consideration for the favors conferred upon them by the incorporation. In Virginia and North Carolina the Supreme Courts in early cases made bold to declare that no act of incorporation ought ever to be passed by the legislature but

³³ DARTMOUTH COLLEGE CASE, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; HAMILTON CO. v. MIGHELS, 7 Ohio St. 109; Soper v. Henry County, 26 Iowa, 267; MINERS' DITCH CO. v. ZELLERBACH, 37 Cal. 543, 99 Am. Dec. 300; TEN EYCK v. CANAL CO., 18 N. J. Law, 200, 37 Am. Dec. 233; Regents of University v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Regents of University v. McConnell, 5 Neb. 423. The fact that the state has an interest in it does not make the corporation public, BANK OF U. S. v. BANK, 9 Wheat. 904, 6 L. Ed. 244; nor the fact that part of its support comes from the state, Cleaveland v. Stewart, 3 Ga. 283; nor that it renders service to the state, Thomson v. Railroad Co., 9 Wall. (U. S.) 579, 19 L. Ed. 792.

See, also, Raleigh & G. R. Co. v. Davis, 19 N. C. 451; Alabama & T. R. R. Co. v. Kidd, 29 Ala. 221; McCune v. Gas Co., 30 Conn. 521, 79 Am. Dec. 278; PEOPLE v. MORRIS, 13 Wend. (N. Y.) 325; Bennett's Branch Imp. Co.'s Appeal, 65 Pa. 242; Directors for Leveeing Wabash River v. Houston, 71 Ill. 318.

in consideration of services to be rendered to the public.³⁴ The same view found frequent expression or recognition also in the decisions of other states, but this judicial opinion as to matters of public policy in respect to corporations has not controlled the legislative departments of our American states. In the appropriate exercise of their co-ordinate powers with regard to the public policy of the state, the legislatures, during the latter half of the nineteenth century, in some states gradually, in others rapidly, seemed generally to have reached their own conclusion that corporations are a public benefit per se. They have accordingly been concocted and created for nearly every imaginable purpose, public and private.³⁵

CLASSIFICATION.

5. Public corporations are divisible into three classes:

- (a) Quasi Corporations.
- (b) Municipal Corporations.
- (c) Quasi Public Corporations.

A quasi corporation is an involuntary political or civil division of the state, created by general law to aid in the administration of government.

A municipal corporation is a body politic and corporate created by law by the incorporation of the inhabitants of a city, town, or district as an agency of the state to regulate and administer the local affairs thereof.

A quasi public corporation is a private corporation organized to make profit by rendering public service or supplying public wants.

³⁴ *MILLS v. WILLIAMS*, 33 N. O. 558.

³⁵ Judge Thompson (1 *Thomp. Priv. Corp.* § 132), giving extracts from the laws of eight representative states, showing the purposes for which corporations are permitted, describes such legislation as "fantastic patchwork." Judge Dillon (1 *Dill. Mun. Corp.* § 37) quotes approvingly the language of an Illinois court, that corporations "have become the greatest means of state and national prosperity," and further says that "public and municipal corporations in all the states and territories are constantly created and universally adopted as part of the ordinary machinery of government."

The word "quasi," used in the first and last of the foregoing definitions, is the word usually employed by courts and authors in describing these two kinds of public corporations, and has been so long used as to be recognized as a part of our legal nomenclature, foreign and technical though it be. Literally rendered, a quasi corporation is an almost corporation, and a quasi public corporation is an almost public corporation. To the profession, therefore, a quasi corporation is an organization vested with some of the powers and faculties of a corporation, and yet defective in some essential features, such as a county, a town, or a school district.**

** The word "quasi" has been too long and generally used to be readily abandoned, but both the quasi corporations might appropriately be included under the term "civil corporations," for civil corporations they surely are. Blackstone says the civil corporations are such as are erected for a variety of temporal purposes, and instances the King, the town and borough corporations, church wardens, college of physicians, and the universities of Cambridge and Oxford. 1 Bl. Comm. *471.

Bouvier defines civil corporations to be "such as afford facilities for obtaining loans of money, making canals, turnpikes, roads, and the like." Title "Corporations."

Judge Dillon declares "civil corporations are of different grades or classes, but in essence and nature they must all be regarded as public." 1 Dill. Mun. Corp. § 25.

It would thus not only simplify the definitions of public corporations, but also comport with the ideas expressed by these standard authors, to say that public corporations are divided into two classes, municipal and civil; the municipal corporation including the strict corporation for urban government, and the civil embracing all other kinds of public corporations.

Quasi corporations are recognized and treated of in the following cases: *HAMILTON CO. v. MIGHELS*, 7 Ohio St. 109; *Wehn v. Commissioners*, 5 Neb. 494, 25 Am. Rep. 497; *Talbot County Com'rs v. Commissioners*, 50 Md. 245; *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534; *School Dist. No. 11 v. Williams*, 38 Ark. 454; *ASKEW v. HALE COUNTY*, 54 Ala. 639, 25 Am. Rep. 730; *Soper v. Henry Co.*, 26 Iowa, 264; *HARRIS v. SCHOOL DIST.*, 8 Fost. (N. H.) 58; *Scales v. Chattahoochee County*, 41 Ga. 225; *Rogers v. People*, 68 Ill. 154; *Beach v. Leahy*, 11 Kan. 23; *Hamilton Co. v.*

A quasi public corporation describes one which is organized under the statutes providing for the creation of private corporations, and therefore is to be treated as such at all times, save only with regard to its public franchise and functions, such as the power of eminent domain or the duty of common carrier.²⁷ To this class belong railways, elevators, canals, and the numerous public-service corporations of our cities.²⁸ The municipal corporation is the only representative of the strict and complete public corporation; it is represented in our cities, boroughs, towns, and villages, whether incorporated under general or special laws.

LEGISLATIVE SANCTION.

6. The creation of a public corporation in America is an act of sovereign legislative power.

This results from the very nature of the corporation, its object and functions. It is an agency of government; it may exercise the sovereign power of eminent domain; or it may be a monopoly. Neither of these powers can emanate from any source except the sovereign. In the United States that sovereign may be either the federal government or a state.²⁹

Garrett, 62 Tex. 602; Riddle v. Proprietors, 7 Mass. 187, 5 Am. Dec. 35; Adams v. Bank, 1 Me. 363, 10 Am. Dec. 88; Town of North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; Commonwealth v. Green, 4 Whart. (Pa.) 531, 598; Cole v. Fire Engine Co., 12 R. I. 202; Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Levy Court v. Coroner, 2 Wall. (U. S.) 501, 17 L. Ed. 851.

²⁷ MUNN v. ILLINOIS, 94 U. S. 113, 126, 24 L. Ed. 77; RAILROAD COMMISSION CASES, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; CHICAGO, B. & Q. R. CO. v. IOWA, 94 U. S. 155, 164, 24 L. Ed. 94; State v. Gas Co., 37 Ohio St. 45.

²⁸ Clark, Priv. Corp. §§ 10, 11, p. 30; Thomp. Priv. Corp. § 27; Head v. University, 47 Mo. 220; Directors for Leveeing Wabash River v. Houston, 71 Ill. 318; Tinsman v. Railroad Co., 26 N. J. Law (2 Dutch.) 148, 69 Am. Dec. 565.

²⁹ Tied. Mun. Corp. § 22; Smith, Mun. Corp. §§ 33, 34; Thomp.

We are accustomed to speak of each of these sovereign powers as "the State"; i. e., the representative of the sovereign will of the people.⁴⁰ Since, therefore, the public corporation is one which is clothed with power to exercise attributes of sovereignty, it is obvious that such power must come from a sovereign; and hence it is a canon of corporation law that only the State can create a public corporation.⁴¹

Creation by the Legislature.

Equally certain is it that this power to create corporations belongs to the legislature of the state. In our complex American system, the powers of government are distributed among the three co-ordinate departments, legislative, executive, and judicial; and their respective functions are well defined.⁴² The creation of a corporation is not a judicial nor an executive act, but an act of legislation. It requires the enactment of a law whereby alone the powers, privileges, and franchises of a corporation can be granted.⁴³ It is therefore the function of the legislature, the lawmaking power, to create a public corporation and give it authority among men.

Priv. Corp. § 35; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; *Deitz v. Central*, 1 Colo. 332.

⁴⁰ We have inherited the term from our English ancestors, who use it in contradistinction to the "church," to express the sovereign temporal power. But in America we have no need for this particular distinction; we use the term both in technical and popular speech to express our idea of the sovereign power of the government, whether federal or state.

⁴¹ *Tied. Mun. Corp.* § 22; *Elliott, Mun. Corp.* § 2; *Smith, Mun. Corp.* § 33; *Town of New Boston v. Dunbarton*, 12 N. H. 409; 1 *Dill. Mun. Corp.* § 37.

⁴² *Cooley, Const. Lim.* (6th Ed.) pp. 46, 47. See, also, *Const. U. S. arts. 1, 2, 3*, where the powers of the various departments of government are explicitly declared.

1 *Dill. Mun. Corp.* § 37.

⁴³ *Hope v. Deaderick*, 8 *Humph. (Tenn.)* 1, 47 *Am. Dec.* 597; *City of Memphis v. Water Co.*, 5 *Heisk. (Tenn.)* 529; *Franklin Bridge Co. v. Wood*, 14 *Ga.* 80; *Mayor of Mobile v. Moog*, 53 *Ala.* 561; *McPherson v. Foster*, 43 *Iowa*, 48, 22 *Am. Rep.* 215; *Atkinson v. Rail-*

Legislative Authority—How Expressed.

This authority is usually conferred by a special act creating the corporation, and declaring its purpose, powers, rights, and functions; or it may be a general act of the legislature authorizing the creation of municipal corporations by an association of individuals on their compliance with certain forms, requisites, and conditions precedent. Under the latter method, the charter usually consists of an instrument signed by the corporators, in which is declared their purpose to become a corporation under the provisions of the general law for the specified purpose, and with certain expressed rights, powers, and franchises under the law. Under general incorporation acts, a public election by the persons residing in the proposed corporate boundaries is usually required antecedent to the formation of the corporation. Under special acts, popular consent is rarely required, unless demanded by the Constitution.

Prescription.

In England many municipal corporations exist without original charter. This is noticeably true of the great corporation of London, whose existence antedates the Norman Conquest; but its corporate character has been repeatedly recognized in royal charters or grants of power and in acts of Parliament, and thus it exists under authority from the State.⁴⁴ Corpora-

road Co., 15 Ohio St. 21. There is no limitation upon this power of the Legislature, except it be provided by Constitution. *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *Chandler v. Douglass*, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732.

⁴⁴ On the continent of Europe cities and towns were first erected into corporate communities and endowed with many valuable franchises in the eleventh century. The consent of the feudal sovereign was absolutely necessary to their creation, inasmuch as many of his prerogatives and revenues were thereby considerably diminished. And so in England, Blackstone tells us, the King's consent, either impliedly or expressly given, is absolutely necessary to the erection of any corporation. 1 Bl. Comm. p. *472. The methods by which this consent was expressly given were by act of Parliament or by charter. Where the corporation existed by prescription, as in the

tions like this are often called "corporations by prescription," since they have exercised their franchises and existed as corporations "time whereof the memory of man runneth not to the contrary."

Origin.

Corporations existed in Greece and Rome fully six hundred years before the Christian Era. With the advance of civilization they were introduced into Gaul and Britain, and elsewhere throughout Europe, and have been used in Western Europe during the twenty-five intervening centuries. Curious as the question may be, it is not profitable for us to discuss whether the corporation had its origin in Rome or Greece. We may well leave that to the contention of the Romanists and the Hellenists. The Greek state we know to have been little more than a city, with surrounding territory attached, owned by the citizens and cultivated by their slaves. The Empire of Rome was not a state, but a gigantic municipality governing the world, and leaving its impress upon all modern life and institutions.⁴⁵

case of the City of London, the consent of the King was conclusively presumed. The royal assent is formally expressed in every act of Parliament. All the earlier acts of Parliament incorporating towns and cities recognized the previous existence of the corporation, and simply confirmed to them existing privileges and franchises; thereby recognizing the previous royal grant either by prescription or charter. But in England, the King's authority to delegate this power was not questioned, and so the great lords, under the Norman, Angevin, Plantagenet, and Tudor Kings, exercised this power and granted charters of incorporation. This power was also exercised by the spiritual lords, and until a comparatively recent date the city of Durham has existed under an episcopal charter granted by the Lord Bishop of Durham.

⁴⁵ We may frankly acknowledge our indebtedness to both Greece and Rome for devising municipalities for the government of urban population. But the mission of Greece was to give art to the world, while Rome contributed law and order. Private modern corporations may therefore best look for their antitype to the Roman Collegia, and modern municipalities will find their prototype in the city of

These three classes of public corporations—municipal, quasi corporations, and quasi public corporations—having many elements in common, have yet so many features of distinction that they can be more satisfactorily and instructively treated under separate heads, whereby the student may be made acquainted with those doctrines which are recognized and enforced in cases, first, of quasi corporations; second, of municipal corporations; and, last, of quasi public corporations.

Rome. She not only conquered the world with her arms, but she impressed upon it the dominant features of her civilization, and especially of her law. The *corpus juris civilis* has ruled continental Europe for a thousand years, and each century of that period has witnessed its gradual encroachment upon the common law of England; and, while the institutions of a country are usually the product of the genius of the people, we cannot, as "the heirs of all the ages," deny this inheritance from Rome.

CHAPTER II.

QUASI CORPORATIONS—LIABILITIES, ELEMENTS, COUNTIES, PROPERTY, ETC.

7. Quasi Corporations.
8. Immunities.
9. Distinguishing Elements.
10. Counties.
11. Creation of Counties—Legislative Power.
- 12-13. Property—Public Use—Sovereign Power.
14. Government and Officers.
15. Powers of County Government.
16. Powers of County Government (continued).
17. Torts.
18. Power of Eminent Domain.
19. Police Power.

QUASI CORPORATIONS.

7. Quasi corporations include every local subdivision of a state, other than a municipality, created by general law as an agency of the state to effect the administration of public affairs and the enforcement of law.

Municipalities proper included incorporated villages, towns, and cities, having the powers of local legislation and administration.¹ They are usually called into existence at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience.² They are highly organized, possessing the usual attributes and incidents of a perfect corporation as recognized

¹ Dill. Mun. Corp. (4th Ed.) § 22, p. 42; Beach, Mun. Corp. § 3, p. 7; CITY OF PHILADELPHIA v. FOX, 64 Pa. 180; Heller v. Stremmel, 52 Mo. 309.

² Dill. Mun. Corp. § 23; Beach, Mun. Corp. § 4, p. 8; BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS, 7 Ohio St. 109; CITY OF PHILADELPHIA v. FOX, 64 Pa. 180.

by the common law.³ They have charters like other complete corporations, and are subject to the great body of the law of corporations, though with many exceptions on account of their public character. In short, they are full corporations, and therefore must be distinguished from quasi corporations, which are involuntary,⁴ having no charter,⁵ governed solely by the statute law of the state, and exercising only the particular administrative functions conferred upon them thereby.⁶

Quasi Corporations.

Quasi corporations have been held to include counties,⁷ townships,⁸ New England towns,⁹ school districts,¹⁰ road dis-

³ *Beach*, Mun. Corp. § 3, p. 7; *Cuddon v. Eastwick*, 1 Salk. 192; *Brinckerhoff v. Board*, 37 How. Prac. (N. Y.) 499; *PEOPLE v. HURLHUT*, 24 Mich. 44, 9 Am. Rep. 103.

⁴ *Beach*, Mun. Corp. § 4; *BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS*, 7 Ohio St. 109.

⁵ *Dill. Mun. Corp.* § 25; *Smith, Mun. Corp.* § 8: "Counties, townships, school districts, road districts, and like public quasi corporations do not usually possess corporate powers under special charters; but they exist under general laws of the state."

⁶ In the case of *BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS*, *supra*, the court said, with reference to counties: "They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them, * * * superimposed by a sovereign and paramount authority." See *Town of Freeport v. Supervisors*, 41 Ill. 495; *Cooley*, Const. Lim. (6th Ed.) p. 294.

⁷ *Talbot County Com'rs v. Queen Anne's Co.*, 50 Md. 245; *Pulaski Co. v. Reeve*, 42 Ark. 55; *BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS*, 7 Ohio St. 109; See, also, *Boone, Corp.* § 10; *Elliott, Mun. Corp.* § 3.

⁸ *MOWER v. LEICESTER*, 9 Mass. 247, 6 Am. Dec. 63; *Town of North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Damon v. Granby*, 2 Pick. (Mass.) 352.

⁹ *Commonwealth v. Roxbury*, 9 Gray (Mass.) 451; *EASTMAN v. MEREDITH*, 36 N. H. 284, 72 Am. Dec. 302—where it was said that the New England towns are involuntary corporations, having given

¹⁰ See note 10 on opposite page.

tricts,¹¹ public commissioners,¹² boards of supervisors,¹³ school trustees,¹⁴ and other bodies "created for a public purpose as an agency of the state, through which it can most conveniently and effectually discharge the duties of the state as an organized government to every person, and by which it can best promote

no assent to their creation, and having been incorporated by virtue of no contract, express or implied, with the state. In *TOWN OF BLOOMFIELD v. BANK*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923, Gray, J., said: "Towns in Connecticut, as in the other New England states, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the state is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government. They have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the quasi corporation." *Town of Granby v. Thurston*, 23 Conn. 416; *Webster v. Harwinton*, 32 Conn. 131; *Parsons v. Goshen*, 11 Pick. 396; *Inhabitants of Norton v. Mansfield*, 16 Mass. 48; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145.

¹⁰ *Beach v. Leahy*, 11 Kan. 23; *INHABITANTS OF FOURTH SCHOOL DIST. v. WOOD*, 13 Mass. 193; *HARRIS v. SCHOOL DIST.*, 8 Fost. (N. H.) 58; *Wilson v. School Dist.*, 32 N. H. 118; *Foster v. Lane*, 30 N. H. 305; *Rogers v. People*, 68 Ill. 154; *Scales v. Chattahoochee Co.*, 41 Ga. 225. A school district has been held to be included within the phrase "political or municipal corporation." *Clark v. Thompson*, 37 Iowa, 536. So, also, a township. *Curry v. Sioux City Tp.*, 62 Iowa, 104, 17 N. W. 191; *Winspear v. Holman*, 37 Iowa, 542. See, as to construction of word "town," *Stout v. Glen Ridge*, 59 N. J. Law, 201, 35 Atl. 913. See, also, *School Dist. No. 11 v. Williams*, 38 Ark. 454.

¹¹ *People v. Lathrop*, 19 How. Prac. (N. Y.) 358; *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851; *Scioto Com'rs v. Gherky*, *Wright* (Ohio) 493; *Lower Board of Com'rs of Roads v. McPherson*, 1 Speers (S. C.) 218.

¹² *Attorney General v. Andrews*, 2 Macn. & G. 226; *Hall v. Taylor*, El. Bl. & El. 107.

¹³ *Pomeroy v. Wells*, 8 Paige (N. Y.) 406; *Todd v. Birdsall*, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522.

¹⁴ *Littlewort v. Davis*, 50 Miss. 403. See *Bassett v. Fish*, 75 N. Y. 303.

the welfare of all.”¹⁵ Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and hence they are called quasi (almost) corporations.¹⁶ Though all in the same class, they are of different grades in the scale of corporate life, from the New England town, which so closely approximates the municipality as scarcely to be distinguishable from it in law,¹⁷ down through the other public instrumentalities of various powers and functions to the school district, declared by the Supreme Court of New Hampshire to be a “quasi corporation of the most limited powers known to the law.”¹⁸ This variety of powers and rank results from the difference in the statutes creating and empowering these various corporations, which must always be consulted and carefully scrutinized to ascertain and determine the limit of powers, functions, and liabilities. Subject to statutory regulation, there are, of course, certain peculiar qualities and attributes common to all quasi corporations, which distinguish them from municipalities, and exempt them from the general law of corporations.

¹⁵ *CITY OF GALVESTON v. POSNAINSKY*, 62 Tex. 118, 50 Am. Rep. 517, wherein also a quasi corporation is spoken of as “a subdivision of the state, created solely for a public purpose, by a general law applicable to all such subdivisions.”

¹⁶ Dill. Mun. Corp. § 25; *Hamilton Co. v. Garrett*, 62 Tex. 602.

¹⁷ *TOWN OF BLOOMFIELD v. BANK*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923; *Commonwealth v. Roxbury*, 9 Gray (Mass.) 451; *EASTMAN v. MEREDITH*, 36 N. H. 284, 62 Am. Dec. 302. In *Warren v. Charlestown*, 2 Gray (Mass.) 84, the court said: “The marked and characteristic distinction between a town organization and that of a city is that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities, whereas in a city government this is all done by their representatives.”

¹⁸ *HARRIS v. SCHOOL DIST.*, 8 Fost. (N. H.) 58.

IMMUNITIES.

8. Quasi corporations are not liable to private action against them for a breach of duty, unless such action be expressly given by statute.

This has been taken as a chief mark of distinction between municipal corporations and quasi corporations. In the leading case of *Board of Hamilton County Com'rs v. Mighels*,¹⁹ in which judgment had been rendered in the court below against the county for neglect of public duty by its board of commissioners, the Supreme Court of Ohio, overruling a previous case,²⁰ reversed the judgment of the inferior court upon the ground that, "by the decisions of courts of justice and the treatises of learned men," the people of a county are not liable for the official delinquencies of their county commissioners, or other county officers, either on the principles or precedents of the common law.²¹ In the course of the opinion expressing the reasons of the court for this decision, Brinkerhoff, J., said: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an

¹⁹ *BOARD HAMILTON COUNTY COM'RS v. MIGHELS*, 7 Ohio St. 109.

²⁰ *Brown County Com'rs v. Butt*, 2 Ohio, 348.

²¹ *BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS*, 7 Ohio St. 109. In this connection the court said: "It is undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners, and, if they think it wise and just, without any power in the people to control the acts of the commissioners, or to exact indemnity from them. But this has not yet been done."

exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

Reasons for.

It is familiar law that no action lies against the state for the neglect or misconduct of its officers; therefore none lies against the county, which is but an arm of the state for general administration; while a municipal corporation, being a voluntary organization for the special benefit of its people, is liable in many particulars for the neglect of its agents to perform official duty, resulting in injury to individuals.²² The Ohio case above cited has been very generally followed in the courts of the United States for the past half century, and may be regarded as established law with regard not only to coun-

²² Judge Dillon, in his *Commentaries on the Law of Municipal Corporations*, vol. 2, § 986 (4th Ed.), says: "As respects municipal corporations proper, whether specially chartered or voluntarily organized under general acts of the character alluded to, it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties; and it is the almost, but not quite, uniform doctrine of the courts that they are also liable where the wrong resulting in an injury to others consists in a mere neglect or omission to perform an absolute and perfect (as distinguished from a legislative, discretionary, quasi judicial, or imperfect) corporate duty." And, further: "What is termed a quasi corporation, though possessing full corporate capacity and a corporate purse, is not impliedly liable for acts of misfeasance or neglect of public duty on the part of its officers and agents, while for the same or a similar wrong there is such a liability resting on municipal or chartered corporations."

In *City of Chicago v. Railroad Co.*, 105 Ill. 73, Sheldon, J., said: "We recognize the doctrine to be that the unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular act relates."

ties, but also to all other quasi corporations.** The Ohio court rested its decision particularly upon the reason that the county had no fund out of which satisfaction could be made, and upon the authority of the leading English case of *Russell v. Men of Devon*,* the authority of which has been generally

** *Larkin v. Saginaw Co.*, 11 Mich. 88, 82 Am. Dec. 63; *Lesley v. White*, 1 Speers (S. C.) 31; *Carroll v. Board*, 28 Miss. 38; *Soper v. Henry Co.*, 26 Iowa, 264; *Board of Chosen Freeholders Sussex County v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530. In *MOWER v. LEICESTER*, 9 Mass. 247, 6 Am. Dec. 63, which was an action against a town for an injury caused by a defect in a highway, Gray, C. J., says: "It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." See *HILL v. BOSTON*, 122 Mass. 344, 350, 23 Am. Rep. 332; *WEIGHTMAN v. WASHINGTON CORP.*, 1 Black, 39-53, 17 L. Ed. 52; *Beardsley v. Smith*, 16 Conn. 375, 41 Am. Dec. 148; *Town of Union v. Crawford*, 19 Conn. 331; *Chidsey v. Canton*, 17 Conn. 475; *Titler v. Iowa Co.*, 48 Iowa, 90; *Sherbourne v. Yuba Co.*, 21 Cal. 113, 81 Am. Dec. 151; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *State v. Hudson Co.*, 30 N. J. Law, 137; *Kincaid v. Hardin Co.*, 53 Iowa, 430, 5 N. W. 590, 36 Am. Rep. 236; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148, 35 Am. Rep. 151.

In Indiana it is imperative upon the county to keep bridges in repair. It being empowered to appropriate money for that purpose, it is held impliedly liable for damages sustained by a traveler from a county bridge negligently allowed to remain out of repair. *House v. Commissioners*, 60 Ind. 580, 28 Am. Rep. 657; *Abbett v. Johnson Co.*, 114 Ind. 61, 16 N. E. 127; *Board of Knox County Com'rs v. Montgomery*, 109 Ind. 69, 9 N. E. 590. And in the New England States the doctrine does not apply to the towns where the duty is private or corporate, as distinguished from public; nor in the case where the wrongful act is in the nature of a trespass upon the property rights of others. *Ball v. Winchester*, 32 N. H. 435, explained and limited by *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. See, also, *Weed v. Greenwich*, 45 Conn. 170.

**RUSSELL v. MEN OF DEVON*, 2 Term R. 667.

recognized by the courts of this country.²⁴ Whether placed upon one ground or the other, or upon both, it may be regarded as the settled law of the land, and the same reasoning which applies to counties may be applied with greater force to other quasi corporations, all of which save the New England town, are of lower grade than the county. The same doctrine has also been repeatedly stated by the courts of New England in the decisions of cases brought against towns to recover damages for injury resulting from the neglect of town officials.²⁵

²⁴ *MOWER v. LEICESTER*, 9 Mass. 247, 6 Am. Dec. 63; *White v. City Council*, 2 Hill (S. C.) 571; *WARD v. HARTFORD CO.*, 12 Conn. 404; *Fowle v. Common Council*, 3 Pet. (U. S.) 409, 7 L. Ed. 719; *Morey v. Newfame*, 8 Barb. (N. Y.) 645.

²⁵ In *Bigelow v. Randolph*, 14 Gray, 541, where a town in Massachusetts had assumed the duties of a school district, and a scholar attending the public school was injured by reason of a dangerous excavation in the schoolhouse yard, owing to the negligence of the town officers, it was held that the town was not liable.

In the case of *EASTMAN v. MEREDITH*, 36 N. H. 284, 72 Am. Dec. 302, the material facts were that the town of Meredith (defendant) built a townhouse, in which, among other things, to hold town meetings; the house, by reason of the negligence of those constructing it for the town, was defectively built, and the flooring gave way during a session of the town meeting, and the plaintiff was injured while in attendance upon said meeting. It was held that the plaintiff could not recover; and this decision was based mainly upon the ground, above stated, that a statute is necessary. It has been uniformly so ruled in New England since the early cases of *Riddle v. Proprietors*, 7 Mass. 169, 5 Am. Dec. 35, and *MOWER v. LEICESTER*, 9 Mass. 250, 6 Am. Dec. 63, in cases to subject towns to a civil action for neglect to perform a public duty.

DISTINGUISHING ELEMENTS.

9. Quasi corporations, notwithstanding the variety of their objects and functions, have other elements in common distinguishing them from municipal corporations proper and other bodies, and attaching them to this class of public corporations, among which are the following:

- (a) They have no charters.**
- (b) They are involuntary organizations created by the sovereign power of the state of its own sovereign will, without the request and regardless of the wishes of the inhabitants.**
- (c) They are created exclusively for purposes of civil administration.**
- (d) They do not possess all the common-law powers implied from and incidental to corporate existence, but such only as are implied from the powers expressly granted, and the duties imposed upon them by statute or usage.**

Quasi corporations are usually erected in pursuance of general law, applicable alike to all parts of the state,²⁶ and the powers conferred and the duties imposed upon each class of them are specified in the general law. Counties, though created and bounded by special statute, obtain their powers and functions from, and are charged with their duties by the general law, and none of these bodies can exist except under legislative enactment. But they are not required to possess, nor do they have, that documentary evidence of authority from the state presumed to be held by full corporations as evidence of their rights and powers.²⁷

Popular Assent.

Private corporations can only be established by the assent and co-operation of the members. Municipal corporations may be, but rarely are, erected without the request or consent of the

²⁶ *CITY OF GALVESTON v. POSNAINSKY*, 62 Tex. 118, 50 Am. Rep. 517.

²⁷ Cooley, Const. Lim. (6th Ed.) pp. 294, 295.

inhabitants of the proposed municipality. Quasi corporations are "superimposed by the sovereign and paramount authority" ²⁸ of the state as agencies for civil government, without the request of the people of the locality, and whether they may wish them or not. "Whether they shall assume the duties or exercise the powers conferred, the people of the political division are not allowed the privilege of choice. The legislature assumes such division of the state to be essential in republican governments, and the duties are imposed as part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty." ²⁹

Local Benefits.

Under our form of government, the sovereign power over public affairs not committed to the federal government belongs to the state. Our theory is that the people rule; they ordain laws through their state legislatures for the purposes of local government. For the enforcement of these laws and the administration of public affairs, various instrumentalities are required. Local self-government is a cherished inheritance of the Anglo-Saxon. To effect this, local agencies are essential, and counties, towns, districts, and local boards have been established for the more efficient administration of general laws throughout the state. They are not created for the special benefit of the people of the locality, but to insure the execution of the sovereign will in all parts of the state, and thereby promote the general welfare.³⁰ It results, of course, that the peo-

²⁸ HAMILTON CO. COM'RS v. MIGHELS, 7 Ohio St. 109. See, also, HARRIS v. SCHOOL DIST., 8 Fost. (N. H.) 58.

²⁹ Cooley, Const. Lim. (6th Ed.) pp. 294, 295. See, also, Scales v. Chattahoochee Co., 41 Ga. 225; Granger v. Pulaski Co., 26 Ark. 37; Palmer v. Fitts, 51 Ala. 489.

³⁰ In HAMILTON CO. COM'RS v. MIGHELS, 7 Ohio St. 109, already cited, Brinkerhoff, J., said: "A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially

ple of each locality are benefited by the local administration under these quasi corporations; but this is in consequence of the public policy of the state and the wholesome effect of the administration of the general law. No particular privileges or franchises, no special rights or favors, are conferred on these quasi corporations. The powers, rights, duties, and functions are wholly of a public nature.²¹

Inherent Powers.

Corporations generally possess certain powers impliedly attached to them as incidental to their existence as such, among which are perpetual succession, a corporate name whereby to contract, receive, hold, and grant title, to sue and be sued, purchase and hold property, have a common seal, make by-laws, and remove members.²² Since quasi corporations are not full

for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." See, also, *Boalt v. Commissioners*, 18 Ohio, 16; *WARD v. HARTFORD CO.*, 12 Conn. 406.

²¹ Judge Cooley, in his treatise on Constitutional Limitations (8th Ed.) p. 295, says, with reference to quasi corporations: "Usually their functions are wholly of a public nature, and there is no room to imply any contract between them and the state, in their organization as corporate bodies, except that which springs from the ordinary rules of good faith, and which requires that the property they shall acquire, by local taxation or otherwise, for the purposes of their organization, shall not be seized by the state, and appropriated in other ways. They are therefore sometimes called quasi corporations to distinguish them from the corporations in general, which possess more completely the functions of an artificial entity."

²² *Clark, Priv. Corp.* § 51; *Elliott, Priv. Corp.* § 140. In *Hope Mut. Life Ins. Co. v. Weed*, 28 Conn. 63, it was said: "While a corporation has no powers except those which are conferred by its charter, it is not requisite that these powers should be expressly granted, but it possesses impliedly and incidentally all such powers as are necessary for the purpose of carrying into effect those which are expressly granted. The creation of a corporation for a specified purpose implies a power to use the means necessary to effect that

corporations, completely organized and empowered by charter to act in many respects as a natural person, but are merely state agencies and instrumentalities for governmental purposes, all implied rights and powers attributed to municipal corporations by common law are not possessed by quasi corporations.³³ They may not have a common seal, nor make by-laws, nor remove members; and yet their nature is such that obviously they have perpetual succession and a corporate name, and they may purchase and hold property necessary for the performance of their functions. They are so unlike the public corporations of England that the rules of the common law cannot be indiscriminately applied to them.³⁴ And yet wherein the purposes of organization and mode of operation of the quasi corporations in this country are identical with similar bodies in England the rules of the common law are applicable. This is illustrated by the fact that very generally in America the courts have recognized and followed, in decisions affecting the liability of counties and other quasi corporations, the leading English case of *Russell v. Men of Devon*.³⁵ The usual rules adopted by the courts for determining the rights and functions and limitations of power of quasi corporations are the canons of construction applied to statutory law.³⁶ The statute confers certain express powers; the courts recognize whatever implied powers are

purpose." See *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515; *Bates v. Beach Co.*, 109 Cal. 160, 41 Pac. 855; *People v. Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; *Lyndeborough Glass Co. v. Glass Co.*, 111 Mass. 315.

³³ *Inhabitants of Fourth School Dist. in Rumford v. Wood*, 18 Mass. 193.

³⁴ *Elliot*, Mun. Corp. § 11; 1 Dill. Mun. Corp. §§ 32-44.

³⁵ 2 Term R. 667; *Taylor v. County Court*, 2 Utah, 405. See *Lyell v. St. Clair Co.*, 3 McLean (U. S.) 580, Fed. Cas. No. 8,621; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *WARD v. HARTFORD CO.*, 12 Conn. 404; *Rock Island Co. v. Steele*, 31 Ill. 543; *Anderson v. State*, 23 Miss. 459.

³⁶ 1 Dill. Mun. Corp. (4th Ed.) §§ 89-91, where the rules of construction are very learnedly and copiously discussed.

essential to carry out the express powers, having in view the purpose and object of the organization. The nature and extent of these powers will be considered hereinafter in connection with each of the several classes of quasi corporations separately noticed.

COUNTIES.

- 10. The county, as the oldest, commonest, and best known of all the members of its class, is recognized as the type of the quasi corporation; and the decisions in cases involving the rights, powers, and liabilities of counties, being the most numerous and important, comprise the body of the law in relation to this class of public corporations.**

The American county, being an adaptation of the English shire to the public wants and conveniences in a newly settled country, is to be found by that name of French origin in every one of the United States save Louisiana, a state of French origin, where it still retains the peculiar English name "parish." The county is the largest permanent subdivision of the state, and, however much its nature, functions, and powers may differ in the various states, it is everywhere recognized as a quasi corporation, notwithstanding the fact that in some of the states, where cities have grown and extended until the municipal territory includes the whole county, will be found close analogies to the English county corporate.³⁷ It is not to be supposed, however, that, because of the universality of this organization in the American commonwealth, the decisions of the supreme court of each state are to be considered as authority in other states in regard to the powers and functions of these civil divisions of the state. These powers and functions are dependent in each state not only upon the constitutional and statutory law of the state, but also upon the local conception of the county existing in that state, growing out of its origin, his-

³⁷ See Standard Dictionary, subject "County Corporate"; Encyclopedia Americana, in verb.

tory, and traditions. But these decisions are consistent and uniform as to the general nature of this organization, as declared by the Supreme Court of Ohio,³⁸ and adopted by Judge Dillon as correctly expressing the local character and functions of such bodies: "Counties are at most local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them."³⁹

Counties, North and South.

Notwithstanding the general, if not unanimous, concurrence of the courts of the other states in this view of the county as a quasi corporation, there is a fundamental political distinction between the counties of New England and of the states south of the Potomac river, having its origin in colonial times, and finding its expression in the Western states settled chiefly by the inhabitants from those respective portions of the country. In the Southern states the county is the unit of political organization and administration, and is therefore a close approximation to the corporation. It has been laid out merely as a part of the governmental machinery, and is subdivided into districts or townships for the more efficient performance of neighborhood governmental functions.⁴⁰ In the New England states, on the contrary, the town is the administrative unit, governed by its peculiar and praiseworthy town meeting;⁴¹

³⁸ *HAMILTON CO. v. MIGHELS*, 7 Ohio St. 109.

³⁹ *HAMILTON CO. v. MIGHELS*, *supra*, quoted by Judge Dillon in his *Commentaries on Municipal Corporations* (4th Ed.) § 23.

⁴⁰ Elliott, *Mun. Corp.* § 6.

⁴¹ Thomas Jefferson wrote: "Those wards called 'townships' in New England are the vital principle of their governments, and have proved themselves the wisest inventions ever devised by the wit of man for the perfect exercise of self-government and for its preservation." Jeff. Cyc. in verb.

and a county is but a collection of these towns. As a consequence, in all the Southern states, formed for the most part upon the Virginia model, the county has a full set of officers, who are charged with the supervision or performance of all functions of local government.⁴² Under the New England plan, however, the powers and functions of a county are few, and pertain chiefly to the maintenance of county buildings, the granting of licenses, and a partial control over highways. Here it was originally created solely for the performance of functions connected with the judicial department of the state, the ordinary ministerial and administrative functions of government being left to the towns; but in the course of time and the progress of development some of these town functions, in a greater or less measure in the various states, have been conferred upon the counties, though the town still remains the political unit.⁴³ In the Middle states, under the aggressive and dominant influence of the conflicting ideas of Massachusetts and Virginia, an amalgamated system of local government was formed, and the county consequently embodies an intermediate legal relation between the counties of New England and those of the Southern states. This system, which distributes affairs of local administration in about equal parts between the county and town or township, is the one existing in the Middle states of New York and Pennsylvania, and commonly prevailing also in the great central states of the Mississippi Valley.⁴⁴ It is

⁴² "The Southern settlers adopted the county as the unit of administration, while the immigrants from New England carried with them their ideas of the importance of the town and the town meeting. In New England the county was originally created solely for judicial purposes, although in the process of time certain other functions have been taken from the township and conferred upon it." Elliott, *Mun. Corp.* § 6.

⁴³ 1 Dill. *Mun. Corp.* §§ 28-30.

⁴⁴ This is known as the "compromise system," being a compromise between the New England town system and the Southern county system. The compromise system was developed in New York and Pennsylvania; but the present system in use in Pennsylvania is

to be remembered that, under whatever system the county is organized, the state constitution and the statute under which it is erected are the measure and chart of its functions and powers.

CREATION OF COUNTIES—LEGISLATIVE POWER.

- 11. Every county exists as a result of a sovereign act of legislation, either constitutional or statutory, separating it from the rest of the state as an integral part of its territory, and establishing it as one of the primary divisions of the state for the purposes of civil administration.**

Counties may be established by an ordinance of the organic law, but they are usually created by special act of legislature, setting forth the name, territorial boundaries, and county seat.⁴⁵ This act of legislation, being an exercise of sovereign legislative power, and solely for public purposes, is limited and restrained in its scope and effect only by the provisions of the state constitution.⁴⁶ These restraints are commonly such as

called the "commissioner form" of this system, and the county authority consists of commissioners elected by the people of the county at large; while under the supervisor, or New York, form, the governing board is composed of supervisors elected from the towns composing the county. This form of the compromise system is found also in Michigan, Illinois, Nebraska, Wisconsin, and Virginia, although in the last-named state the form is somewhat modified. The commissioner form of the system, in addition to Pennsylvania, already mentioned, exists in Kansas, Missouri, Iowa, Indiana, and Ohio, and in a modified form in Minnesota, North and South Dakota, Maine, and Massachusetts, and, according to 1 How. Local Const. Hist. p. 439 (cited by Dr. Elliott in his *Principles of the Law of Public Corporations*, § 5, note 2), has "been very generally adopted as the form for the county authority in the commonwealths of the South, where there are in the county generally no lesser districts to be represented."

⁴⁵ Elliott, *Mun. Corp.* § 20.

⁴⁶ *State v. Dorsey Co.*, 28 Ark. 378; *Wade v. Richmond*, 18 Grat. (Va.) 583; *State v. McFadden*, 23 Minn. 40; *State v. Commissioners*, 12 Kan. 426.

insure sufficient territory and population and prevent undue encroachment upon the territory of existing counties.⁴⁷ This special act also commonly provides the date when the county shall assume its functions, and names commissioners for the purpose of doing the acts necessary to bring it into existence. This special act is in no sense a charter, and does not express the powers, functions, duties, and liabilities of the county thus created. These are to be found in the constitution and statutes which provide for the organization of the state government, the division of its territory into counties, and express the governmental powers and functions conferred upon them.⁴⁸

Popular Consent.

In some states the constitution requires some popular expression of consent as a condition precedent to the erection of a new county. The determination by the legislature of the existence of the functions necessary to the formation of a new county cannot be assailed in any court by evidence aliunde.⁴⁹ In case the de facto doctrine has been applied to counties illegally organized, and the acts of the county officers are declared binding upon the people and territory of such county,⁵⁰ a state may be estopped by its repeated acts of recognition of a county from questioning the regularity of the passage of the

⁴⁷ As an instance of these restraints, the Constitution of Tennessee (article 10, § 4) provides: "New counties may be established by the legislature to consist of not less than two hundred and seventy-five square miles, and which shall contain a population of seven hundred qualified voters; no line of such county shall approach the courthouse of any old county from which it may be taken nearer than eleven miles, nor shall such old county be reduced to less than five hundred square miles."

⁴⁸ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 108; *City of Chicago v. Wright*, 69 Ill. 326; *Astor v. New York*, 62 N. Y. 567; *United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937.

⁴⁹ *Fraser v. James*, 65 S. C. 78, 43 S. E. 292; See *People v. Nally*, 49 Cal. 478. This was a submission to the people of the county of the question of annexation of a portion of an adjoining county.

⁵⁰ *Garfield Tp. v. Flinnup*, 8 Kan. App. 771, 61 Pac. 812.

act creating it.⁵¹ An act creating a new county, and embracing therein a portion of an old county before the voters therein had signified their consent as required by the organic law, is void.⁵²

Legislative Control.

Legislative control over counties is so complete that it may change the lines between existing counties, take portions of existing counties to create new counties, and dissolve a county by attaching its territory to other counties.⁵³ This power, however, like all others, must be exercised in the manner and subject to the conditions prescribed by the constitution; and the failure to comply with a constitutional condition precedent will render such act of dissolution or reduction void, and the legal status of the county will be unaffected thereby.⁵⁴

PROPERTY—PUBLIC USE—SOVEREIGN POWER.

- 12. Counties have the implied power, as incidental to their objects and existence, to take and hold such real estate as may be essential and useful for county purposes.**
- 13. Such property is held for the public use, and subject to the sovereign power of the state.**

This power to purchase and hold sufficient real estate to enable the county to discharge all its public functions is essential to it as an agency of the state for more efficient government; and, where the legislature has omitted to give the county the

⁵¹ *People v. Alturas Co.*, 6 Idaho, 418, 55 Pac. 1067, 44 L. R. A. 122.

⁵² *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677.

⁵³ *In re Division of Howard Co.*, 15 Kan. 194. See, also, *Opinion of Supreme Court Judges on Township Organization Law*, 55 Mo. 295; *Town of Freeport v. Supervisors*, 41 Ill. 495; *LARAMIE CO. v. ALBANY CO.*, 92 U. S. 307, 23 L. Ed. 552.

⁵⁴ *Marion Co. v. Grundy Co.*, 5 Sneed, 490; *Bradley v. Com'rs. 2 Humph.* 428, 37 Am. Dec. 563; *Roane Co. v. Anderson Co.*, 89 Tenn. 259, 14 S. W. 1079; *Union Co. v. Knox Co.*, 90 Tenn. 541, 18 S. W. 254.

express power to take and hold necessary real property, the courts readily imply the same as reasonably necessary and proper for the execution of the powers expressly granted, as in case of private corporations.⁵⁵ This would include in New England, where the county functions are few, such real estate as is necessary for the convenience of a courthouse and jail; and in the South, where these functions are most numerous, the taking and holding of title to as much realty as may be necessary not only for courthouses and jails, but also for workhouses and poor-farms, reformatories and asylums.⁵⁶

Legislative Control.

The county, being only an agency of the state, holds such property for its constituent sovereign, and subordinate to its rights and power of disposition.⁵⁷ The legislature, as the trustee for and representative of the general public, has full power and control over the public property held by the county.⁵⁸ The only limitations upon this power are those expressed in the state and federal constitutions.⁵⁹ Unless so restrained, the legislature may by valid law compel the county to purchase and hold appropriate and necessary real estate, or may in its discretion compel the sale thereof, and cover the purchase price into the public treasury.⁶⁰

⁵⁵ PEOPLE v. INGERSOLL, 58 N. Y. 1, 17 Am. Rep. 178; Hayward v. Davidson, 41 Ind. 212; Board of Sup'rs of Warren Co. v. Patterson, 56 Ill. 111; Clark, Priv. Corp. §§ 51, 52.

⁵⁶ Board of Sup'rs of Warren Co. v. Patterson, 56 Ill. 111; Hayward v. Davidson, 41 Ind. 212; PEOPLE v. INGERSOLL, 58 N. Y. 1, 17 Am. Rep. 178.

⁵⁷ Stone v. Charlestown, 114 Mass. 214; PEOPLE v. INGERSOLL, supra; Smith v. Leavenworth, 15 Kan. 81.

⁵⁸ Jefferson County Com'rs v. People, 5 Neb. 136, wherein it was held that, a county being justly indebted under a contract for the erection of public buildings therein, the legislature may require it to issue its bonds to pay such indebtedness.

⁵⁹ Dill. Mun. Corp. § 65; State v. McFadden, 23 Minn. 40; State v. County of Dorsey, 28 Ark. 378.

⁶⁰ PEOPLE v. INGERSOLL, 58 N. Y. 1, 17 Am. Rep. 178; Shanklin v. Madison Co., 21 Ohio St. 575.

GOVERNMENT AND OFFICERS.

- 14. The administration of county affairs is committed by law to an official body chosen by the people, and invested with discretionary power necessary for the efficient exercise of their powers, functions, and duties; and by whatever name this body may be called, whether supervisors or commissioners, board or court, it constitutes the county government.**

Sheriffs, coroners, clerks, and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county; their duties are ministerial, and, though local officers, their duties are performed in the name of the state, and for the general welfare.⁶¹ Certain county duties are connected with these offices which pertain to county affairs; but they are usually ministerial only, and do not involve the control or management of county affairs, which necessarily require the exercise of discretionary power.⁶²

County Government—Of What Constituted.

The county government, properly so called, is composed of a board of commissioners, a board of supervisors, or a county court, including the justices of the county, presided over by a chairman chosen by the body, or a county judge elected by the people.⁶³ This body resembles a city council or board of alder-

⁶¹ BOARD OF COM'RS OF HAMILTON CO. v. MIGHELS, 7 Ohio St. 109; Tuthill v. City of New York, 29 Misc. Rep. 555, 61 N. Y. Supp. 968; Bouv. Law Dict. subject "Sheriffs"; Texas & P. Ry. Co. v. Walker, 93 Tex. 611, 57 S. W. 568. See, also, Bouldin v. Lockhart, 3 Baxt. (Tenn.) 263; Braden v. Stumph, 16 Lea (Tenn.) 581; Dougherty Co. v. Kemp, 55 Ga. 252.

⁶² South v. Maryland, 18 How. (U. S.) 396, 15 L. Ed. 433; Bell v. Railroad Co., 4 Wall. (U. S.) 598, 18 L. Ed. 338; State v. Colt, 8 Ohio S. & C. P. Dec. 62.

⁶³ Elliott, Mun. Corp. § 5; Kankakee Co. v. Aetna Life Ins. Co., 106 U. S. 668, 2 Sup. Ct. 80, 27 L. Ed. 309; Moultrie Co. v. Rockingham Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; Shanklin v. Madison Co., 21 Ohio St. 575.

men in a municipality, and in some particulars also a board of directors in a private corporation.⁶⁴ It directs, manages, and controls the county affairs, and is vested with all necessary power and discretion for so doing.⁶⁵ These affairs are exclusively public, but are such as pertain peculiarly to local interest and welfare of the county, and affect the county revenues and treasury. In all such affairs this body governs and controls, and is therefore properly called the county government.⁶⁶

POWERS OF COUNTY GOVERNMENT.

15. The county government has only such powers as are expressly conferred by statute, or necessarily implied therefrom.

Chief among these is the power to contract in the name of the county, and for its benefit.⁶⁷ Without this power no business can be wisely transacted. The county board or court is general agent and trustee for the county in all its affairs.⁶⁸ It must have general supervision and management of all county affairs, but must necessarily intrust matters of detail to individual attention and personal supervision of its agents. As a general rule, a contract on behalf of the county must be made by the

⁶⁴ Pegram v. Cleaveland Co., 65 N. C. 114; Sterling v. Parish of West Feliciana, 26 La. Ann. 59.

⁶⁵ Shanklin v. Madison Co., 21 Ohio St. 575; State v. Ormsby Co., 7 Nev. 392; Sheboygan Co. v. Parker, 3 Wall. (U. S.) 98, 18 L. Ed. 33; Ezell v. Giles Co., 3 Head (Tenn.) 586; L. & N. R. R. Co. v. Davidson Co., 1 Sneed (Tenn.) 639, 62 Am. Dec. 424; Bridgenor v. Rodgers, 1 Cold. (Tenn.) 261.

⁶⁶ Boone, Corp. § 310; Stewart v. Roberts, 1 Yerg. (Tenn.) 889; Maury Co. v. County, 1 Swan (Tenn.) 239.

⁶⁷ Hopkins v. Clayton Co., 32 Iowa, 15; Ellis v. Washoe Co., 7 Nev. 291; Montgomery Co. v. Barber, 45 Ala. 237; Babcock v. Goodrich, 47 Cal. 488; Highland County Com'rs v. Rhoades, 26 Ohio St. 411.

⁶⁸ Andrews v. Pratt, 44 Cal. 809; Board of Sup'rs of Richmond Co. v. Wandel, 6 Lans. (N. Y.) 88; Board of Com'rs of Bladen County v. Clarke, 78 N. C. 255.

body in lawful session.⁶⁹ In such case, of course, the memorandum of the contract is written on the minutes; but it may also contract by parol through its agents in small matters.⁷⁰ An unauthorized contract, if within the scope of the county powers, may be made binding by ratification;⁷¹ but contracts made beyond the scope of the lawful powers of the county are subject to the general doctrine of *ultra vires*.⁷²

⁶⁹ *Clarke v. Lyon Co.*, 7 Nev. 75; *Talbott v. Iberville Parish*, 24 La. Ann. 135; *Mitchell v. Com'rs*, 18 Kan. 188.

⁷⁰ *Ring v. Johnson Co.*, 6 Iowa, 265; *Montgomery Co. v. Barber*, 45 Ala. 237; *Hopkins v. Clayton Co.*, 32 Iowa, 15; *Babcock v. Goodrich*, 47 Cal. 488; *Ellis v. Washoe County*, 7 Nev. 291; *Highland County Com'rs v. Rhoades*, 26 Ohio St. 411; *Beck v. Puckett*, 2 Tenn. Cas. 490.

⁷¹ *Hawk v. Marion Co.*, 48 Iowa, 472; *Talbott v. Iberville Parish*, 24 La. Ann. 135; *Clarke v. Lyon Co.*, 7 Nev. 75; *Mitchell v. Commissioners*, 18 Kan. 188. But ratification cannot validate acts void for want of power. *Wallace v. Tipton*, 3 Tenn. Cas. 542; *Colburn v. Railroad*, 94 Tenn. 43, 28 S. W. 298.

⁷² *King v. Mahaska Co.*, 75 Iowa, 329, 39 N. W. 636. A contract by county authorities for building a courthouse provided that changes thereafter made in the plan, increasing or lessening the cost, should be followed by like changes in the amount to be paid for the building, which was the full sum authorized by vote of the people under a law requiring the question to be submitted to them. It was held that changes imposing liability for more than the sum voted were void. See, also, *Burnett v. Maloney*, 97 Tenn. 712, 37 S. W. 689, 34 L. R. A. 541; *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470.

An agreement between the board of commissioners of a county and an attorney, whereby, in return for services in aiding the state's attorney to collect taxes against railroad lands, he is to receive 25 per cent. of any amount recovered, either in money or lands, out of which one-fifth is to be paid the state's attorney, was held *ultra vires* as to the commissioners, and void. *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23.

In *Granulis v. Board of Com'rs of Blue Earth Co.*, 81 Minn. 55, 83 N. W. 495, an agreement between the commissioners and an attorney, under which the attorney was to unearth and bring to light personal property in the county which had not been assessed or taxed for a number of years, in consideration of which service the

POWERS OF COUNTY GOVERNMENT (Continued).

16. In the exercise of lawful discretion the county board or court may—

- (a) Employ attorneys.**
- (b) Purchase, hold, and sell real estate.**
- (c) Contract for the construction and furnishing of county buildings.**
- (d) Provide for the support of the poor, and the maintenance of county schools.**
- (e) And, generally, contract for any object within the scope of the duties and powers of the county.**

In varying but appropriate language the statutes of the states have conferred upon these county governing bodies the power to do such acts as are necessary for the management of the county affairs. This is a general expression covering the implied powers of a corporation, and is probably not essential to clothe the county government with such powers. Having the power to sue and be sued, the county, of course, must be represented by counsel. It has therefore been adjudged in numerous cases that the county government has power in its discretion to employ an attorney to represent and act for the county in its litigation, actual or prospective;⁷³ and it may exercise this power even in cases which the law provides shall be prosecuted by the state's attorney.⁷⁴ But this employment

board of commissioners agreed by resolution to pay him a compensation equal to one-half of all taxes paid into the county treasury as the result of his labors, was held to be void, as being ultra vires. See, also, *Municipal Security Co. v. Baker Co.*, 39 Or. 396, 65 Pac. 369. But see *American Stave & Cooperage Co. v. Butler Co.* (C. C.) 93 Fed. 301.

⁷³ *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Ottawa Gaslight & Coke Co. v. People*, 138 Ill. 336, 27 N. E. 924; *Franklin Co. v. Layman*, 34 Ill. App. 606; *Tatlock v. Louisa Co.*, 46 Iowa, 138; *Bevington v. Woodbury Co.*, 107 Iowa, 424, 78 N. W. 222; *Duluth S. S. & A. R. Co. v. Douglass Co.*, 103 Wis. 75, 79 N. W. 34.

⁷⁴ *Jordan v. Osceola Co.*, 59 Iowa, 389, 13 N. W. 344; *Taylor Co.*

is not binding beyond the term of office of the board making the contract.⁷⁵

Buying, Holding, and Selling Real Estate by County.

In the due discharge of its public functions it is necessary for the county to have real estate on which to erect county buildings, such as courthouses, jails, workhouses, reformatories, and the like. The county court or board, therefore, has power to purchase and hold sufficient real estate on which to erect all necessary public buildings; and, where the support of the poor devolves upon the county, it may also purchase a farm therefor.⁷⁶ The courthouse and jail must, of course, be located at the county seat; but the location of the other buildings, and the situation of the other county real estate, rest in the discretion of the governing body of the county.⁷⁷ So, also, the amount of real estate necessary for each one of these purposes, and the sum to be paid therefor, lies in the discretion of the county board or court.⁷⁸ In case the county should contract to purchase land for other than public purposes, or to purchase an unreasonable quantity for public purposes, such purchase

v. Standley, 79 Iowa, 666, 44 N. W. 911; Sterling Gas Co. v. Higby, 134 Ill. 557, 25 N. E. 680.

⁷⁵ Board of Com'rs of Jay Co. v. Taylor, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160; Vacheron v. City of New York, 34 Misc. Rep. 420, 69 N. Y. Supp. 608.

⁷⁶ Holten v. Lake Co., 55 Ind. 194, wherein the county commissioners were held to have a prima facie right to purchase land for a home for the county poor. As to power of commissioners of the county to lease premises or rent rooms for county purposes, see Norfolk County Sup'rs v. Cox, 98 Va. 270, 36 S. E. 380; Gardner v. Dakota Co., 21 Minn. 33. But see Ford v. Mayor, etc., 4 Hun (N. Y.) 587; Stewart v. Otoe Co., 2 Neb. 177; Thayer v. McGee, 20 Mich. 195. As to employment of a physician for care of the county poor, see Morgan County Com'rs v. Holman, 34 Ind. 256; Board of Com'rs of Perry County v. Lamax (Ind. App.) 31 N. E. 584.

⁷⁷ Board of Sup'rs of Culpeper County v. Gorrell, 20 Grat. (Va.) 484; Allen v. Lytle, 114 Ga. 275, 40 S. E. 238.

⁷⁸ Sheldley v. Lynch, 95 Mo. 487, 8 S. W. 434; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

might be enjoined at the suit of the taxpayers as ultra vires, the county authorities having power to purchase only for public uses, and then only so much as is reasonably necessary.⁷⁹ Whenever it is necessary the county may also buy in real estate at execution, foreclosure, or tax sale, for the purpose of saving debts due to it.⁸⁰ Property so purchased, unless redeemed, may be sold and transferred by the county, and a good title thereby conveyed.⁸¹ This power is implied in favor of counties equally with other corporations, and for the same reasons.⁸² A county may likewise receive and hold property conveyed to it,

⁷⁹ *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Colorado Paving Co. v. Murphy*, 78 Fed. 30, 23 C. C. A. 631, 37 L. R. A. 630; *Davenport v. Buffington*, 97 Fed. 237, 38 C. C. A. 453, 46 L. R. A. 377; *Burnett v. Abbott*, 51 Ind. 254. See, also, *Grannis v. Blue Earth County Com'rs*, 81 Minn. 55, 83 N. W. 495; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Warren County Agricultural Joint Stock Co. v. Barr*, 55 Ind. 30; *Rothrock v. Carr*, 55 Ind. 334; *Hooper v. Ely*, 48 Mo. 505. As to the purchase of property at an excessive valuation, see *State v. Board of Chosen Freeholders*, 58 N. J. Law, 531, 22 Atl. 343. An injunction will also lie to restrain the payment of public money for a purpose wherein the commissioners are being misled or defrauded: *State v. Cuyahoga Co.*, 9 Ohio S. & C. P. Dec. 76. But in *Scalf v. Collins County*, 80 Tex. 514, 16 S. W. 314, an attempt was made to have a conveyance of a homestead to the county set aside on the ground that it was not needed for county buildings or other county purposes. The conveyance was held good.

⁸⁰ *Cardwell v. Hargis*, 24 Ky. Law Rep. 1406, 71 S. W. 488; *Shepard v. Murray County*, 33 Minn. 519, 24 N. W. 291; *Audubon Co. v. County*, 40 Iowa, 460.

⁸¹ *Shannon v. O'Boyle*, 51 Ind. 565. "All civil corporations, * * * unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had, an unlimited control over their respective properties, and may alienate in fee, or make what estates they please, for years, for life, or in tail, as fully as any individual may do with respect to his own property." 1 Kyd, Corp. 108.

⁸² *Clark, Priv. Corp.* pp. 142-144; *Page Co. v. County*, 41 Iowa, 115; *Linville v. Bohannon*, 60 Mo. 554.

either by deed or devise in trust, for any public use within the scope of its powers.⁸³

Construction of County Buildings.

The county board or court has likewise authority to contract for the construction of necessary county buildings and the furnishing thereof; and in the absence of statute directing the mode of contracting, as by plans, specifications, and competitive bidding, the method of negotiations and contracting is in the discretion of the governing body; and it has been held even, where the statute provides the method of negotiations and contracting, that the county board may in emergency depart from the statutory method.⁸⁴ The county board or court cannot delegate this power to contract for a public building to any other person or number of persons.⁸⁵ Actions upon claims for extras, swelling the price beyond the contract limit, have been repeatedly sustained in Indiana;⁸⁶ and in Dakota it has been

⁸³ *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. In *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422, it was decided that, while the supervisors of a county, who were made by statute a corporation for special purposes, might take by grant a parcel of land in trust that they might erect a courthouse and jail, these being county purposes, they could not be seised as trustees for the use of an individual, or in trust for building a church or schoolhouse for the use of the inhabitants of a particular town in the county. See 1 Dill. Mun. Corp. (4th Ed.) §§ 567-574.

⁸⁴ *Board of Com'rs of Harrison County v. Byrne*, 67 Ind. 21, where the contractor had abandoned the construction of the county building, and the county commissioners were held to have the power to take up and finish the work without change of plans or specifications or the letting of a new contract. See, also, *Board of Com'rs of Clinton County v. Hill*, 122 Ind. 215, 23 N. E. 779.

⁸⁵ *Russell v. Cage*, 66 Tex. 428, 1 S. W. 270. Contra, *Beck v. Puckett*, 2 Tenn. Cas. 490, in which the general statement is made that the county court may delegate to a committee its power to make a binding contract pertaining to any matter in which the court might bind the county.

⁸⁶ *Commissioners of Gibson County v. Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; *Same v. Steel Co.*, 123 Ind. 364, 24 N. E. 115.

decided that taxpayers of the county cannot enjoin the issuance of warrants in payment of work done in the erection of a courthouse under an unauthorized contract.⁸⁷ In the absence of statutory provision, the same general rules control contracts for the erection of any other necessary public buildings by the county.⁸⁸

Poor, Support of—Schools.

In many states the support of the poor is a town or township charge; but in the majority of them this duty is devolved upon the county. In these latter states the county authorities, in addition to purchasing land for a poorhouse and erecting the same, have power to contract for the necessary expense for the support of the poor, including food, clothing, and medical attention.⁸⁹ In some cases necessities have been provided in emergency without contract with the proper authority, but the person claiming compensation therefor must prove the necessity.⁹⁰ So, also, where schools of any kind are a county charge, it is competent for the county board to contract for the erec-

⁸⁷ Wood v. Bangs, 1 Dak. 179, 48 N. W. 586. See, also, Ferriss v. Williamson, 8 Baxt. (Tenn.) 424.

⁸⁸ McDonough County v. Thomas, 84 Ill. App. 408; Bradford County v. Horton, 6 Lack. Leg. N. (Pa.) 306; Stuart v. Easton, 170 U. S. 383, 18 Sup. Ct. 650, 42 L. Ed. 1078. See, also, CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; Nelson v. Carter County, 1 Cold. (Tenn.) 208; and Ross v. Anderson County, 8 Baxt. (Tenn.) 249, wherein it was held that the county cannot issue commercial paper.

⁸⁹ King v. Sullivan County, 8 Baxt. (Tenn.) 329; Board of Com'rs of Morgan County v. Seaton, 90 Ind. 158; Board of Com'rs of Perry County v. Lamax, (Ind. App.) 31 N. E. 584; Morgan County v. Seaton, 122 Ind. 521, 24 N. E. 213; Board of Com'rs of Orange County v. Ritter, 90 Ind. 362; Smith v. Commissioners, 21 Kan. 669.

⁹⁰ "The function of administering public charities is governmental, and township trustees are agents of the county for that purpose. This agency is created and defined by law, and consequently is of such a character that all are bound to take notice of its scope and limitations. Commissioners of Warren County v. Osburn, 4 Ind. App. 590, 31 N. E. 541.

tion of necessary buildings, and for incurring other expenses necessary for the conduct of the schools.⁹¹

Other Purposes.

Other functions are also devolved upon the county in several of the states, such as the care of roads, bridges, ferries, and other public concerns. For the necessary construction, maintenance, and repair of these utilities, it is competent for the county authorities to enter into contracts and incur liability on behalf of the county.⁹² In general, it may be said that, wherever the county is endowed with a function or charged with a duty, the county authorities may make contracts, in their discretion, for the performance of such functions and discharge of such duties, to the end that the public weal and convenience may not suffer;⁹³ but all such contracts must be

⁹¹ *Nashville & C. & St. L. R. Co. v. Franklin County*, 5 Lea (Tenn.) 707; *Shelby County v. Exposition Co.*, 96 Tenn. 659, 36 S. W. 694, 33 L. R. A. 717; *McCallie v. Mayor*, 3 Head (Tenn.) 318; *Luttrell v. Knox County*, 89 Tenn. 253, 14 S. W. 802. The general statutes of Maryland provided that, where the state school fund was insufficient in any county, it was incumbent upon the county commissioners, on demand of the school board, to levy a pro rata tax not exceeding a certain amount on each \$100 for school purposes; and a special local statute provided that in Anne Arundel county there might be an additional levy, not exceeding a certain rate, for the purposes of a separate fund, both to be applied by the treasurer for school expenses. It was held that the county commissioners must apply the gross amount of tax levied to the school commissioners, and deductions for any other purpose, either as commissions or expenses of gathering the tax, could not be made. *Board School Com'rs of Anne Arundel County v. Gantt*, 73 Md. 521, 21 Atl. 548.

⁹² *Nashville & C. & St. L. R. Co. v. Franklin County*, 5 Lea (Tenn.) 707; *Luttrell v. Knox County*, 89 Tenn. 253, 14 S. W. 802; *Beck v. Puckett*, 2 Tenn. Cas. 490; *Shelby County v. Exposition Co.*, 96 Tenn. 666, 36 S. W. 694, 33 L. R. A. 717. See, also, *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122, and for powers of county over roads, *Ledbetter v. Turnpike Co.*, 110 Tenn. 92, 73 S. W. 117.

⁹³ *Kelly v. Multnomah County*, 18 Or. 356, 22 Pac. 1110, in which the county was held liable for the cost of blankets furnished by

within the method and limits prescribed by statute, otherwise they are subject to be impeached as *ultra vires* acts.⁸⁴ But by all lawful contracts by the county board or court, within the scope of their authority, and for all emergent necessities for public uses supplied to the county and received by proper officers, a valid obligation is laid upon the county, which may be enforced by appropriate proceeding, and for the breach of which there is a remedy by action at law.⁸⁵

the keeper of prisoners confined under criminal process in its jail, the statute making it the duty of the keeper to furnish and keep clean necessary bedding for such prisoners, and providing for the charges of safe-keeping and maintaining such prisoners to be paid from the county treasury. But see *Warren County Agricultural Joint Stock Co. v. Barr*, 55 Ind. 30; *Wells v. Supervisors*, 102 U. S. 625, 28 L. Ed. 122; *Flagg v. Parish*, 27 La. Ann. 319; *POLICE JURY OF PARISH OF TENSAS v. BRITTON*, 15 Wall. 566, 21 L. Ed. 251; *Commonwealth v. Commissioners*, 2 Serg. & R. (Pa.) 198; *Jackson County v. Rendleman*, 100 Ill. 379, 39 Am. Rep. 44; *Henry v. Cohen*, 66 Ala. 382; *Lewis v. Freeholders*, 37 N. J. Law, 254.

⁸⁴ The county possesses no powers except such as are conferred expressly or by necessary implication, and these are strictly construed. *Burnett v. Maloney*, 97 Tenn. 712, 37 S. W. 689, 34 L. R. A. 541; *CLAIBORNE COUNTY v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *State v. Puckett*, 7 Lea (Tenn.) 709; *Colburn v. Railroad Co.*, 94 Tenn. 43, 28 S. W. 296; *Louisville & N. R. Co. v. County Court*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

⁸⁵ *Gibson County v. Rains*, 11 Lea (Tenn.) 20; *Taylor v. Mayor*, 82 N. Y. 10; *Adams v. Tyler*, 121 Mass. 380; *Commissioners of Roads and Revenues v. Hurd*, 49 Ga. 462, 15 Am. Rep. 682. See *People v. Supervisors*, 50 Ill. 213; *Murphy v. Commissioners*, 14 Minn. 67 (Gil. 51); *Klein v. Supervisors*, 51 Miss. 878. As to when mandamus is a proper remedy, see *Commissioners' Court v. Moore*, 53 Ala. 25.

TORTS.

- 17. A county, in the exercise of the governmental functions delegated to it by the state, is not liable for corporate neglect, nor for the misfeasance or negligence of its officers or agents.**

As we have already seen,⁹⁶ counties are but subdivisions of the state, erected solely for the exercise of governmental authority; and it would be as proper to hold the state as the county liable for the wrongful acts of its officers.⁹⁷ But the sovereign is not liable to action by the citizen unless it chooses to make itself so. Unless, therefore, the state gives a right of action by statute against a county for the nonfeasance or misfeasance of its officers, no such action can be brought.⁹⁸ "No suit can be maintained against the county upon the principle of respondeat superior, because the relation of master and servant does not exist. County officers are quasi public officers of the state."⁹⁹

POWER OF EMINENT DOMAIN.

- 18. Counties may exercise the sovereign power of eminent domain in taking property for public use, without the consent of the owner, on making due compensation therefor.**

The power of eminent domain has been declared by the courts to be "a necessary and inherent attribute of sovereignty in the state, which does not depend upon constitutional pro-

⁹⁶ Ante, § 10.

⁹⁷ Wood v. Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561; Nashville & K. R. Co. v. Wilson County, 89 Tenn. 597, 15 S. W. 446; Hawkins v. Justices, 12 Lea (Tenn.) 356; Hollenbeck v. Winnebago County, 95 Ill. 151, 35 Am. Rep. 151.

⁹⁸ Barbour County v. Horn, 48 Ala. 649; 1 Beach, Pub. Corp. pp. 744-746.

⁹⁹ Fry v. Albemarle County, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879. See, also, Dougherty County v. Kemp, 55 Ga. 252.

visions for its existence.”¹⁰⁰ The county, being an agency of the state to execute the sovereign will and administer public affairs in a part of its territory, must necessarily possess and exercise this power wherein it is charged with public duties. Thus it has been authorized to take private property for the purpose of making public highways, establishing ferries, taking lands for public buildings, and other like works of public necessity.¹⁰¹

Delegation.

This sovereign power exists primarily, of course, in the legislature.¹⁰² But the legislature may in its discretion exercise this power through a public corporation.¹⁰³ This power is commonly delegated by statute, expressing the purposes for which it may be exercised, and the mode and manner of exer-

¹⁰⁰ *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; *People v. Mayor*, 32 Barb. (N. Y.) 102; *Raleigh & G. R. Co. v. Davis*, 19 N. C. 451; *Noll v. Railroad Co.*, 32 Iowa, 66; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389. For the distinction between eminent domain and police power, see *City of Philadelphia v. Scott*, 81 Pa. 80, 22 Am. Rep. 738; *Hine v. New Haven*, 40 Conn. 478; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349. See, also, *Lewis, Em. Dom.* §§ 1, 8.

¹⁰¹ *Reeves v. Wood County*, 8 Ohio St. 333; *Inhabitants of Wayland v. Commissioners*, 4 Gray (Mass.) 500; *Culpeper County Sup'rs v. Gorrell*, 20 Grat. (Va.) 484.

¹⁰² *Beekman v. Railroad Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *De Varaigne v. Fox*, 2 Blatchf. (U. S.) 95, Fed. Cas. No. 3,836. But see *In re New York Cent. R. Co.*, 66 N. Y. 407.

¹⁰³ *Mercer v. Railroad Co.*, 36 Pa. 99; *Weir v. Railroad Co.*, 18 Minn. 155 (Gil. 139); *WEST RIVER BRIDGE CO. v. DIX*, 6 How. (U. S.) 507, 12 L. Ed. 535; *Harbeck v. Toledo*, 11 Ohio St. 219; *Eastern R. Co. v. Railroad Co.*, 111 Mass. 125, 15 Am. Rep. 13; *Patterson v. Boom Co.*, 3 Dill. (U. S.) 465, Fed. Cas. No. 10,829; *City of East St. Louis v. St. John*, 47 Ill. 463; *Barrington v. Ferry Co.*, 69 N. C. 165; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Rep. 550; *Johnson v. Water Works Co.*, 67 Barb. 415.

cising it, which statute may be either special or general.¹⁰⁴ But where the county is charged with the performance of public duties, and invested with general powers of performance of acts necessary therefor, the right to acquire land by eminent domain has been held to be an incidental power necessarily implied therefrom.¹⁰⁵ But such power will be implied only for obvious public purposes, and in cases of plain necessity.¹⁰⁶

POLICE POWER.

19. In many states, counties, as important agencies for the public welfare, are clothed with a limited measure of police power for the public health and safety of the locality.

The police power may justly be regarded in America as the supreme exercise of sovereignty. Under it the government may, for the protection of the public, summarily destroy private property without compensation, and with impunity.¹⁰⁷ This power is inherent in the state, and may be delegated to public corporations.¹⁰⁸ It is usually exercised by state officials, or delegated to municipalities, where dense population requires its most frequent exercise. But county governments are often

¹⁰⁴ *Buffalo & N. Y. C. R. Co. v. Brainard*, 9 N. Y. 100.

¹⁰⁵ *Culpeper County Sup'rs v. Gorrell*, 20 Grat. (Va.) 484.

¹⁰⁶ 1 Beach, Pub. Corp. § 665; Boone, Corp. §§ 92, 93.

¹⁰⁷ "The destruction of infected trees by order of a public official, after due inspection, is a remedy which, however severe, is appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as well as without any compensation to the owner for resulting loss." Baldwin, J., in *STATE v. MAINE*, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *Bissell v. Davison*, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253; *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 907; *McDonald v. Red Wing*, 13 Minn. 38 (Gil. 25); *Cooley, Const. Lim.* (4th Ed.) 746; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

¹⁰⁸ *Baungartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Pratt v. Litchfield*, 62 Conn. 112, 25 Atl. 461.

clothed by express statute with police power to protect the public health and private property. In cities this power extends to a variety of objects, including the regulation of occupations and amusements, of wharves and markets, and other lawful business, the prohibition of liquor shops and houses of ill fame, and the prevention of fires, and generally the abatement of nuisances.¹⁰⁹

Limited Scope.

The power is conferred upon counties usually for the purpose of preventing the spread of contagious and infectious diseases, either among people or cattle, thereby preserving the public health and the property of the locality; and where granted by valid statute, there can be no doubt of the lawful possession of the power by the county.¹¹⁰ Contrary opinions have been expressed by the courts of different states as to the power of the legislature to devolve upon counties medical treatment of indigent inebriates, such a statute being held valid in Maryland and void in Wisconsin.¹¹¹ But there seems to be general assent to the doctrine that statutes are valid which are calculated to preserve the public health and prevent the spread of disease, which may destroy not only people, but also animals and vegetation. In short, saving of life, whether animal or vegetable, is

¹⁰⁹ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3; *Ogden City v. McLaughlin*, 5 Utah, 387, 16 Pac. 721; *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Robinson v. Mayor, & Humph. (Tenn.)* 156, 34 Am. Dec. 625; *Wartman v. Philadelphia*, 33 Pa. 203.

¹¹⁰ *City of Clinton v. Clinton County*, 61 Iowa, 205, 16 N. W. 87; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525. In California county commissioners are given power to license and regulate occupations. *Los Angeles County v. Eikenberry*, 131 Cal. 461, 63 Pac. 766.

¹¹¹ *City of Baltimore v. Institute*, 81 Md. 106, 31 Atl. 437, 27 L. R. A. 647; *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105. The latter opinion is based upon the idea that this was not a public purpose nor a public act.

a lawful purpose of government; and the police power is appropriate and lawful whenever it preserves and protects the public against epidemic.¹¹²

"Counties are clothed, just as states and commonwealths are, with certain police powers which are not the creatures of legislation, and cannot wait upon legislation, but must be asserted just as the exigencies of the county demand, but always for public purposes, and within the scope and objects of their organization."¹¹³ Such paramount police power can, of course, be implied in favor of a county only in case of great emergency, where the state has failed to provide adequate sanitary means for the public protection. In such exigencies the reasonable exercise of appropriate sanitary measures by the county authorities finds judicial approval in our courts.¹¹⁴ *Salus populi est suprema lex.*

¹¹² *SLAUGHTER HOUSE CASES*, 16 Wall. (U. S.) 36, 21 L. Ed. 394; *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130; *City of St. Paul v. Byrnes*, 38 Minn. 176, 36 N. W. 449; *Beiling v. Evansville*, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 35; *Thomas v. Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727; *Hale v. Houghton*, 8 Mich. 458; *State v. Wordin*, 56 Conn. 216, 14 Atl. 801; *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

¹¹³ *Beck v. Puckett*, 2 Sh. Tenn. Cas. 496.

¹¹⁴ The act challenged in this case was a contract made by a county court with a private person to transcribe and rebind the registration books of the county, which had been so charred and injured in a fire as to make this work indispensable to the consulting of the county records by the public. Sneed, J., in delivering the opinion of the court, sustaining the exercise of this power by the county officials, says: "The principle upon which these police powers are exercised is the safety and welfare of the people, a sort of *jus excelsior*, that cannot wait upon delay. '*Salus populi est suprema lex.*' A necessity which Lord Coke says makes that lawful which seemeth unlawful. 8 Coke, 68. The law, says Sir Matthew Hale, of a particular time and place. Hale, P. C. 54. A necessity, says Hobart, that even overcomes the law, and defends what it compels. Hob. 144. In times of exigency, such powers have been exercised by public corporations from immemorial times, and are justified as the necessary incidents of corporate entity."

CHAPTER III.

QUASI CORPORATIONS (Continued).

20. County Liabilities.
21. Contracts—Subject-Matter.
22. Forms of Contracts.
23. Borrowing Money.
24. County Bonds.
25. Fiscal Management.
26. Taxation.
27. Legislative Control.

COUNTY LIABILITIES.

20. Counties, being involuntary civil divisions of the state, created as governmental agencies for purely public purposes, partake of the state's exemption from liability, and can be sued only when that immunity has been waived by the state for the county.

The favorite maxim of the common law, that there is no wrong without its remedy, is not applicable to counties.¹ By another maxim the sovereign was exempt from suit. And so with us the state can only be sued by its express consent; and counties, being merely parts of the state, partake of that immunity.² The law exempting the sovereign, rather than the

¹ *Gallia County Com'rs v. Holcomb*, 7 Ohio, 232, pt. 1; *Fry v. Albemarle Co.*, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879; *White v. Chowan Co.*, 90 N. C. 439, 47 Am. Rep. 534; *Brabham v. Hinds Co.*, 54 Miss. 363, 28 Am. Rep. 352; *Monroe Co. v. Flynt*, 80 Ga. 489, 6 S. E. 173; *Schuyler Co. v. Mercer Co.*, 9 Ill. 20; *WARD v. HARTFORD CO.*, 12 Conn. 404; *Hunsaker v. Borden*, 5 Cal. 238, 63 Am. Dec. 130; *Lyell v. St. Clair Co.*, 3 McLean, 580, Fed. Cas. No. 8,621.

² *Watkins v. Walker Co.*, 18 Tex. 535, 70 Am. Dec. 298; *Wood v. Tipton Co.*, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561; *Bailey v. Lawrence Co.*, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881; *Common-*

law making the subject liable, is the fundamental law applicable to counties.³ Hence, as we have seen,⁴ the county is exempt from liability for the misfeasance or malfeasance of its officers, unless suit is expressly given by statute therefor. The same general rule prevails also in regard to contracts. Counties, being created by statute, and receiving all their powers therefrom, are subject only to such liabilities as are imposed by statute with respect to their powers and functions.⁵ Possessing no powers except such as are conferred expressly or by necessary implication, their liabilities are strictly correlative. There is no liability resting upon the county, and no right of action

wealth v. Huntingdon Co., 3 Rawle (Pa.) 487; *Wolcott v. Lawrence Co.*, 26 Mo. 272; *Raymond v. Stearns Co.*, 18 Minn. 60 (Gil. 40); *Emerson v. Washington Co.*, 9 Me. 88; *Heller v. Shawnee Co.*, 23 Kan. 128; *James v. Conecuh Co.*, 79 Ala. 304; *Brewster Co. v. Presidio Co.*, 19 Tex. Civ. App. 638, 48 S. W. 213.

³ *BURNETT v. MALONEY*, 97 Tenn. 712, 37 S. W. 689, 34 L. R. A. 541; *Harvey v. Tama Co.*, 46 Iowa, 522; *Moon v. Howard Co.*, 97 Ind. 176; *Granger v. Pulaski Co.*, 26 Ark. 37; *Madden v. Lancaster Co.*, 65 Fed. 191, 12 C. C. A. 506; *Eastman v. Clackamas Co. (C. C.)* 32 Fed. 24; *Ayers v. Thurston Co.*, 63 Neb. 96, 88 N. W. 178; *Board of Com'rs of Greer Co. v. Watson*, 7 Okl. 174, 54 Pac. 441.

⁴ *Ante*, § 17.

⁵ *BOARD OF JEFFERSON COUNTY SUP'RS v. ARRIGHI*, 54 Miss. 668; *Saline Co. v. Wilson*, 61 Mo. 237; *Brainard v. Kings Co.*, 84 Hun, 290, 32 N. Y. Supp. 311; *Davis v. Ontonagon Co.*, 64 Mich. 404, 31 N. W. 405; *Morrison v. Decatur Co.*, 16 Ind. App. 317, 44 N. E. 65; *Keller v. Hyde*, 20 Cal. 594; *Pacific Bridge Co. v. Clackamas Co. (C. C.)* 45 Fed. 217. A county is not liable for damages caused by the negligent construction of a ditch by its officers or agents, unless liability is expressly or by necessary implication imposed by statute. *Florida v. Galveston Co. (Tex. Civ. App.)* 55 S. W. 540. Nor for damages caused by a mob, though resulting from torts of its officers. See *Board of Chosen Freeholders of Sussex Co. v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530; *MOWER v. LEICESTER*, 9 Mass. 247, 6 Am. Dec. 63; *Talbot County Com'rs v. Commissioners*, 50 Md. 245; *WARD v. HARTFORD CO.*, 12 Conn. 404; *Soper v. Henry Co.*, 26 Iowa, 264. Also *Crause v. Harris Co.*, 18 Tex. Civ. App. 375, 44 S. W. 616.

against it, except by statutory expression or necessary implication;⁶ and, with regard to this liability and action based upon statute, the tendency of the court is to apply the rules of strict construction.⁷

Strict Construction.

This rule and practice of courts is the key of numerous decisions against the validity of claims against counties. Their dominant tone is the protection of the public, and this is lowered only by some prevailing equity. It pervades decisions on all classes of county claims, including bonds as well as warrants and accounts. The maxims of the law of agency are rigidly applied. The public is the principal, speaking through the legislature, restrained only by constitutional limitations. The county is the agent of the state, solely for public purposes.⁸ The statute is the power of attorney or letter of authority—in some instances the note of instructions. This is public, and

⁶ *Wiegel v. Pulaski Co.*, 61 Ark. 74, 32 S. W. 116; *Lancaster Co. v. Fulton*, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436; *Borough of Henderson v. Sibley Co.*, 28 Minn. 515, 11 N. W. 91; *Allegheny Co. v. Parish*, 93 Va. 615, 25 S. E. 882; *Byrne v. East Carroll Parish*, 45 La. Ann. 392, 12 South. 521; *Lebcher v. Custer Co.*, 9 Mont. 315, 23 Pac. 713; *Board of Cass County Com'rs v. Ross*, 46 Ind. 404; *Floria v. Galveston Co. (Tex. Civ. App.)* 55 S. W. 545.

Counties have been invested with express powers only of limited extent, and in all other matters, including the conservation of highways and bridges, being mere divisions organized for the convenient exercise of portions of the political power of the state, are not liable for injuries suffered through their agents in discharging their duties, unless expressly made liable by statute. *Markey v. Queens Co.*, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46. See, also, as to county liability for defective bridge, *Board of Com'rs of Jasper Co. v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *Montgomery County Com'rs v. Coffenberry*, 14 Ind. App. 701, 42 N. E. 491.

⁷ *Richardson v. Grant Co. (C. C.)* 27 Fed. 495; *Hight v. Monroe Co.*, 68 Ind. 575; *STEINES v. FRANKLIN CO.*, 48 Mo. 167, 8 Am. Rep. 87; *State v. Commissioners*, 11 Ohio St. 183.

⁸ *Savage v. Bangor*, 40 Me. 176, 63 Am. Dec. 658; *Browning v. Springfield*, 17 Ill. 143, 63 Am. Dec. 345; *Highway Com'rs of Niles Tp. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; *Lorillard v. Town*, 11

every one dealing with the county must take notice of its terms and provisions. It is the only warrant of authority to the agent. Outside of it the county has no power to bind the public. The county officials or boards can act as agents only within its limits. Beyond these their agency ceases, and their acts and contracts are void.⁹ Whoever recognizes their assumptions and pretensions of public agency outside of the statutes, and there seeks by contract with them to bind the public to obligations and expose it to liability, does so at his own peril. The courts protect the public against such efforts by a strict construction of the law. The decisions are far from harmonious in all particulars, and some of them seem to ignore this cardinal doctrine and underlying theory in the results attained. But none of the courts have avowed a conflicting rule of decision, and the relation of public agency and the rule of strict construction must be regarded as the settled law of the land with regard to the contractual liability of counties.¹⁰

N. Y. 392, 62 Am. Dec. 120; *EASTMAN v. MEREDITH*, 36 N. H. 284, 72 Am. Dec. 302.

"A county is but an agent of the state, and therefore not liable for interest under general provisions of a statute for payment of interest, but only where it contracts for interest, or is required by a statute to pay the same." *Seton v. Hoyt*, 34 Or. 266, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634.

It was held in the case of *Commissioners of Buncombe Co. v. Payne*, 123 N. C. 432, 31 S. E. 711, that the payment of interest on the bonds of a county does not estop the county to deny their validity. See, also, *Hughes v. Monroe Co.*, 79 Hun, 120, 29 N. Y. Supp. 495.

⁹ *Board of Orange County Com'rs v. Ritter*, 90 Ind. 362; *Smith v. Barrow Co.*, 44 Wis. 686; *Stamp v. Cass Co.*, 47 Mich. 330, 11 N. W. 183; *Dennison v. St. Louis Co.*, 33 Mo. 168.

One contracting with county commissioners is charged with knowledge of the limits of their authority. *Lebcher v. Commissioners*, 9 Mont. 315, 23 Pac. 713.

¹⁰ *NORTON v. SHELBY CO.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887; *Rayburn v. Davis*, 2 Ill. App. 548; *Murphy v. Napa Co.*, 20 Cal. 497; *Richardson v. Grant Co. (C. C.)* 27 Fed. 495; *Board of*

CONTRACTS—SUBJECT-MATTER.

21. To create contractual obligation on the part of the county, and render it legally liable for indebtedness of any kind, the following elements are usually declared by the courts as essential requisites:

- (1) There must be a valid statute or statutes empowering the county to contract in regard to the subject-matter of the undertaking.**
- (2) The contract must be confined within the limitations of this statutory authority with reference both to the public objects included in it, and the amount of consideration to be paid therefor.**
- (3) Any condition precedent involving popular consent or approval must be strictly performed or complied with.**
- (4) The contract must be made on the part of the county by the board or officers thereunto appointed by law, and substantially in the mode prescribed by the statute.**

The source of contractual powers in a county may be found either in the state Constitution, or in general statutes, or in special laws. When not expressly conferred by these or any of them, authority is often held to exist under the doctrine of implied powers.¹¹ But cases are rare in which such implication is made by the courts in regard to subject-matter. If this cannot be found expressed in special law, or designated in some enumeration of powers, or included within the scope of a gen-

Shawnee County Com'rs v. Carter, 2 Kan. 115. In two Illinois cases it has been declared by the Supreme Court of that state that it will not imply power in a county to donate money or land to a railroad company from a grant of power to it to subscribe for stock in such company. **Choisser v. People, 140 Ill. 21, 29 N. E. 546; Sampson v. People, 140 Ill. 466, 30 N. E. 689.** A county has no power to execute a deed with covenants of warranty, no statute conferring such power, and it cannot be implied. **Harrison v. Palo Alto Co., 104 Iowa, 383, 73 N. W. 872.**

¹¹ **Woods v. Madison Co., 136 N. Y. 411, 32 N. E. 1011; Salt Lake Co. v. Golding, 2 Utah, 319; Levy Court v. Coroner, 2 Wall. (U. S.) 501, 17 L. Ed. 851; Grant Co. v. Lake Co., 17 Or. 453, 21 Pac. 447.**

eral grant of authority to counties, then the contract is beyond the scope of the county's agency, and is therefore void.¹² In these cases the courts apply the maxim, "Expressio unius exclusio alterius," and, in favor of the public, presume against the threatened liability.

Limitations as to Objects and Amount.

In determining the validity of claims against it, the next question for consideration is whether the county has confined its contract to objects appropriate to the subject-matter, and to the amount authorized to be expended for that purpose. Ordinarily counties may not incur an annual indebtedness in excess of annual revenue. Public contracts require appropriations, and appropriations require public funds, and the annual expense of the county under general laws must be limited to the annual resources. When special expenditures are to be made for extraordinary purposes, they must be provided for either by an additional tax levy, or by authorized corporate indebtedness, usually in the form of bonds. The amount of this indebtedness is generally fixed in the statute, and this is the limit of the authority of the county. Any contract binding the county to a greater expenditure is void, either in whole, or as to the excess above the statutory limit.¹³ The latter ruling has been

¹² Cooley, Const. Lim. (6th Ed.) p. 461; Dill. Mun. Corp. § 457. MARSH v. FULTON CO., 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Driftwood Val. Turnpike Co. v. Bartholomew Co., 72 Ind. 226; Maupin v. Franklin Co., 67 Mo. 327; Clark v. Polk Co., 19 Iowa, 248; Estep v. Keokuk Co., 18 Iowa, 199; Board of Tippecanoe County Com'rs v. Cox, 6 Ind. 403; Nashville v. Sutherland, 92 Tenn. 335, 21 S. W. 674, 19 L. R. A. 619, 36 Am. St. Rep. 88; Pugh v. Little Rock, 35 Ark. 75; Cowdrey v. Caneadea (C. C.) 16 Fed. 532; City of Eufaula v. McNab, 67 Ala. 588, 42 Am. Rep. 118.

¹³ King v. Mahaska, 75 Iowa, 329, 39 N. W. 636; DIXON CO. v. FIELD, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; DAVIESS CO. v. DICKINSON, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065. A county by receiving benefits, is not estopped to assert the invalidity of warrants issued in excess of the constitutional limit of indebtedness. Municipal Security Co. v. Baker Co., 39 Or. 396, 65 Pac. 369.

made in some cases where the contract was severable. So, also, the contract may embrace with lawful subject-matter other objects not included in the statutory authority, in which case the contract will be void as to all matters dehors the statute; and, unless they are severable from the valid portion of the contract, it will be entirely void.¹⁴

Extraordinary Expenditures—Popular Assent Thereto.

Extraordinary expenditures, such as the removal of a county seat, involving the construction of new county buildings, the erection of some large public improvement by the county, and especially the subscription of a county subsidy to promote the construction or completion of a railroad, canal, or other public work undertaken by private companies, are rarely, if ever, permitted without popular consent expressed at the ballot box. Full and strict compliance with such a condition precedent is a sine qua non to a valid contract upon this subject. The public election must be duly held at the prescribed time throughout the county by the proper officers, and lawful return made, showing the statutory majority required, before the county officers are authorized to bind the county to any expenditure upon the subject.¹⁵ The courts evince no disposition to liberalize the rules of strict construction in this particular. The rule is so inflexible in such case that no tax can be imposed or liability incurred without the consent of the taxpayers. If the legislature requires this as a condition precedent to a contract, the mandate is imperative, and noncompliance with it avoids all contracts based upon it.¹⁶

¹⁴ *People v. May*, 9 Colo. 404, 12 Pac. 838; *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318.

¹⁵ *Nelson v. Haywood Co.*, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; *Hobart v. Supervisors*, 17 Cal. 23; *Crooke v. Davless Co.*, 36 Ind. 320; *Colburn v. Railroad Co.*, 94 Tenn. 43, 28 S. W. 298; *Allen v. Cerro Gordo Co.*, 34 Iowa, 54; *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57; *Dyer v. Erwin*, 106 Ga. 845, 33 S. E. 63.

¹⁶ *Reichard v. Warren Co.*, 31 Iowa, 381; *Lewis v. Bourbon Co.*, 12 Kan. 186; *State, to Use of Neal, v. Saline Co.*, 48 Mo. 390, 8 Am. Rep. 108. In *Black v. Commissioners*, 129 N. C. 121, 39 S. E. 818, it

County Liabilities Incurred upon Whose Authority.

All county liabilities not specially prescribed by law arise in consequence of the act of some board or officer authorized to represent the county and incur the liability. This liability may be contracted by the county board under general authority, or by a committee thereunto lawfully appointed by it, or by some officer duly authorized by statute. In some instances the course of action to be taken by the constituted authority to incur the liability is prescribed by the statute. The general rule of law is that that particular board or officer of the county empowered to do the act or make the contract alone has power to make the county liable.¹⁷ No other can assume the power and responsibility; he would be a mere volunteer, and could not bind the county by his acts. The method of official action is sometimes so prescribed by the statute as to become material to the contract. In such case the law must be substantially pursued, or the contract will not be binding;¹⁸ as, for instance, if the statute prescribes that the contract shall be in writing, and shall be signed by specified officers, no action could be maintained upon

was ruled that a tax levy for building a courthouse was not such extraordinary expense, within the meaning of the Constitution, as to require its submission to popular vote. But see *Dyer v. Erwin*, 106 Ga. 845, 33 S. E. 63, where, on full and exhaustive examination, the conclusion was reached as stated in the text. See, also, *Locke v. Davison*, 111 Ill. 19.

¹⁷ *Simmes v. Chicot Co.*, 50 Ark. 506; *Tatlock v. Louisa Co.*, 46 Iowa, 138; *Davis v. Linn Co.*, 24 Iowa, 508; *ANTHONY v. COUNTY OF JASPER*, 101 U. S. 693, 25 L. Ed. 1005; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 348, 6 Sup. Ct. 88, 29 L. Ed. 430; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173; *Chisholm v. Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686.

¹⁸ *State v. Marion Co.*, 21 Kan. 419; *Bentley v. County Com'rs*, 25 Minn. 259; *Head v. Insurance Co.*, 2 Cranch (U. S.) 127, 2 L. Ed. 229; wherein Marshall, C. J., declared: "When the law prescribes to the corporation a mode of contracting, it must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." See, also, *AGAWAM NAT. BANK v. SOUTH HADLEY*, 128 Mass. 503.

an oral contract made by the designated officers, or written contract signed by other officers, though it be otherwise authorized by law.¹⁹

Illustrations.

Thus where the chairman of the board of supervisors, who was also ex officio chairman of the building committee, contracted with the plaintiffs for materials for a jail upon the credit of the county, but without express authority from the supervisors or the building committee, the court refused to infer the authority of the chairman in the premises, and held the contract void; ²⁰ and it was held in the same case that a statement by the chairman of the county board, made to the claimant in open session and without objection, that the board could not pay the bill that day, but would do so as soon as the work was accepted, did not constitute a contract binding as an obligation upon the county. And where a county tax collector employed an attorney to represent the interests of the county, the contract was held void, because that power was vested alone in the county court.²¹ So, also, it has been held in Indiana that a promise made by county commissioners to pay extra compensation for extra work by a contractor on a "free gravel road" was not binding upon the county, because the statute had imposed the expense of constructing these roads upon the landowners.²²

¹⁹ *Hasbrouck v. Milwaukee*, 21 Wis. 217; *City of Sacramento v. Kirk*, 7 Cal. 419; *Bonesteel v. New York*, 22 N. Y. 162; *O'Hara v. New Orleans*, 30 La. Ann. 152; *Hague v. Philadelphia*, 48 Pa. 527; *Starkey v. Minneapolis*, 19 Minn. 203 (Gil. 166); *Lebcher v. Custer Co.*, 9 Mont. 315, 23 Pac. 713.

But the ancient formalities in regard to corporation contracts are not now observed or required, even in case of public corporations. *FANNING v. GREGOIRE*, 16 How. (U. S.) 524, 14 L. Ed. 1043; *City of Chattanooga v. Geller*, 13 Lea (Tenn.) 611; *ROSS v. MADISON*, 1 Ind. 281, 48 Am. Dec. 361; *Bellmeyer v. Marshalltown*, 44 Iowa, 564; *City of Alton v. Mulledy*, 21 Ill. 76; *Montgomery Co. v. Barber*, 45 Ala. 237.

²⁰ *Rice v. Plymouth Co.*, 43 Iowa, 136.

²¹ *Simmes v. Chicot Co.*, 50 Ark. 566, 9 S. W. 308.

²² *Little v. Hamilton Co.*, 7 Ind. App. 118, 34 N. E. 499.

In Pennsylvania it has been decided that a county is not liable to an innkeeper for board and lodging of militia called out by the sheriff to quell a riot and keep the peace, but that the innkeeper must look to the sheriff personally.²³ In regard to attorneys, it has also been held that the county is not liable for one appointed by the court to represent the prosecution in the absence of the county attorney; ²⁴ nor when retained by the district attorney to assist him in a state case; ²⁵ nor one appointed by a justice of the peace; ²⁶ nor for a special attorney to represent the county when there is a regular county attorney; ²⁷ nor for one assisting in the prosecution of a state case, even when retained by the county commissioners.²⁸

Implied Contracts.

On the other hand, a county has been held liable in an action of assumpsit for the value of property or services of a person received and appropriated by it, in the absence of any express contract. In such cases, of course, knowledge of the facts must be brought home in due season to the county board in order to fasten liability upon the county.²⁹ But the law will not imply a contract in conflict with an express contract,³⁰ nor where an express contract is forbidden.³¹ An action will also

²³ *Raush v. Ward*, 44 Pa. 389.

²⁴ *Miller v. Buena Vista Co.*, 68 Iowa, 711, 28 N. W. 31.

²⁵ *Tatlock v. Louisa Co.*, 46 Iowa, 138.

²⁶ *Davis v. Linn Co.*, 24 Iowa, 508.

²⁷ *Brome v. Cuming Co.*, 31 Neb. 362, 47 N. W. 1050.

²⁸ *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Modoc Co. v. Spencer*, 103 Cal. 498, 37 Pac. 483.

²⁹ *Madison Co. v. Gibbs*, 9 Lea (Tenn.) 383; *Butler v. Neosho Co.*, 15 Kan. 178; *Brady v. New York*, 10 N. Y. 260; *Montgomery Co. v. Barber*, 45 Ala. 237.

³⁰ *Emerson v. Washington Co.*, 9 Me. 95; *Young v. Iberville Parish*, 22 La. Ann. 87.

³¹ *Hovey v. Wyandotte Co.*, 56 Kan. 577, 44 Pac. 17; *Richardson v. Grant Co. (C. C.)* 27 Fed. 495; *Argenti v. San Francisco*, 16 Cal. 255; *McDONALD v. NEW YORK*, 68 N. Y. 23, 23 Am. Rep. 144; *Burrill v. Boston*, 2 Cliff. 590, Fed. Cas. No. 2,198; *The Collector v. Hubbard*, 12 Wall. (U. S.) 1, 20 L. Ed. 272; *Murphy v. Louisville*,

lie against a county for money had and received under an ultra vires contract, provided the money was applied to a lawful county purpose.³²

FORMS OF CONTRACTS.

22. If the form of contract, or mode of executing the same, be not prescribed by statute, the contracts of counties may be made in the same way as those of other corporations, and may be either in writing or by parol.

Important county contracts, requiring the exercise of discretion, must, of course, be made by the governing board of the county, whether it be court, commissioners, supervisors, freeholders, or police juries. Such boards are required to keep a record of their proceedings, and it has been held that their action as a board can be proven only by the record.³³ In other cases proof has been admitted of the oral declarations of the

9 Bush (Ky.) 189; *Curtis v. Fiedler*, 2 Black (U. S.) 478, 17 L. Ed. 273; *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Rep. 598.

³² *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232; *Borough of Henderson v. Sibley Co.*, 28 Minn. 515, 11 N. W. 91; *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Waitz v. Ormsby Co.*, 1 Nev. 370; *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Allen v. LaFayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; *Chapman v. Douglas Co.*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Morton v. Nevada (C. C.)* 41 Fed. 582.

³³ *Rich v. Town of Mentz*, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. Ed. 1074; *Cowdrey v. Town of Caneadea (C. C.)* 16 Fed. 532; *Crump v. Colfax Co.*, 52 Miss. 107; *People v. Fulton Co.*, 14 Barb. (N. Y.) 56. But the contrary rule is the prevailing one. *United States Bank v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; *Wayne Co. v. Detroit*, 17 Mich. 390; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351; *Gassett v. Andover*, 21 Vt. 342.

In Kentucky it has been held that where bodies like the county court have judicial powers, and also large administrative and executive powers, and are by law empowered to employ agents in the execution of the latter branch of powers, the acts of the agents are not in every case required to appear of record.

chairman made in open session to the contractor.⁸⁴ The question of the contract is thus made to turn upon the rules of evidence. The rule enforced in the courts seems to be that strict proof will be required of persons suing the county upon a contract wholly executory.⁸⁵ But if under a contract informally made, the county has received the benefits contracted for, either in property or services, and the matter is within the scope of the county's authority, formal proof will not be required; thus following the rule applied to private corporations.⁸⁶

Agency—Ratification.

In minor contracts relating to small matters of detail entering into current expenses of the county, and in purely ministerial matters where official discretion is not required, contracts may be by parol, and may be made by agents or employes under special or general authority.⁸⁷ In these cases the general doc-

⁸⁴ *Rice v. Plymouth Co.*, 43 Iowa, 136; *Curtis v. Cass Co.*, 49 Iowa, 421. See *Gordon v. Denton Co.* (Tex. Civ. App.) 48 S. W. 737.

⁸⁵ *Starkey v. Minneapolis*, 19 Minn. 203 (Gil. 166); *Gilbert v. New Haven*, 40 Conn. 102; *Board of Hunting County Com'rs v. Boyle*, 9 Ind. 296.

⁸⁶ *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *State Board of Education v. Aberdeen*, 56 Miss. 518; *Wayne Co. v. Detroit*, 17 Mich. 390; *Inhabitants of Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 10 Atl. 809; *Dauphin Co. v. Bridenhart*, 16 Pa. 458; *Ring v. Johnson Co.*, 6 Iowa, 265; *Montgomery Co. v. Barber*, 45 Ala. 237. If a county obtains the money or property of others without authority, the law, independently of statute, will compel restitution or compensation. *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *City of Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153.

⁸⁷ *City of Alton v. Mulledy*, 21 Ill. 76; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351; *FANNING v. GREGOIRE*, 16 How. (U. S.) 524, 14 L. Ed. 1043. See, also, *Schuylkill County Com'rs v. Snyder*, 20 Pa. Co. Ct. R. 649; *Hanley v. Randolph Co. Court*, 50 W. Va. 439, 40 S. E. 389; *Black v. Commissioners*, 129 N. C. 121, 39 S. E. 818; *Steiner v. Polk Co.*, 40 Or. 124, 66 Pac. 707, where a county judge ad-

trines of the law of agency are controlling, and, in matters within the scope of the county purposes, contracts originally unauthorized may become valid and binding by ratification, so as to render the county liable thereon.³⁸ But ratification will not validate even an executed contract pertaining to matters beyond the limit of the county authority.³⁹

vised that a wounded pauper be taken to the hospital for treatment, and requested a physician to attend him and present his bill to the county court. The court allowed bills for care, board, and hospital charges, and it was held that such action constituted a ratification of the arrangement made by the judge, so as to render the county liable for the value of the physician's services. See *Duncombe v. Ft. Dodge*, 38 Iowa, 281.

³⁸ *Schmidt v. County of Stearns*, 34 Minn. 112, 24 N. W. 358; *Morris County Com'rs v. Hinchman*, 31 Kan. 729, 3 Pac. 504; *Clarke v. Lyon Co.*, 8 Nev. 181; *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *City of Galveston v. Morton*, 58 Tex. 409; *Wilhelm v. Cedar Co.*, 50 Iowa, 254; *Otoe Co. v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173. In *Grenada County Sup'rs v. Brown*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704, it was declared that a subscription to the stock of a railway company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent enactment, when legislation of that character is not prohibited by the Constitution, and when that which is done would have been legal, had it been done under legislative sanction previously given.

³⁹ *BOARD OF JEFFERSON COUNTY SUP'RS v. ARRIGHI*, 54 Miss. 668; *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *CITY OF BRYAN v. PAGE*, 51 Tex. 332, 32 Am. Rep. 637; *Brown v. Mayor*, 63 N. Y. 239; *Scott's Ex'rs v. Shreveport (C. C.)* 20 Fed. 714; *Green v. Cape May*, 41 N. J. Law, 46. A county cannot ratify a contract to pay for extra materials and labor furnished to complete a county building, the value of which exceeded the statutory limit, which contract was void for the failure of the county commissioners to advertise for bids in the performance of such labor and furnishing of such materials. *Tullock v. Webster Co.*, 46 Neb. 211, 64 N. W. 705; *DAVIESS CO. v. DICKINSON*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026.

BORROWING MONEY.**23. Liability cannot be fixed upon a county for money borrowed in its name without statutory authority.**

This rule applies to all cases of borrowing, even though the money borrowed be applied to strictly public purposes, and be within the scope of the county government.⁴⁰ In this respect the county is wholly unlike the private corporation. Not being for private profit, but solely for public use, it cannot engage in business ventures. Power to borrow money is not implied as an inherent power of a quasi corporation.⁴¹ Public revenues are provided for its necessary expenses, and the wholesome rule prevails that a county must live within its means. Annual appropriations must not exceed annual revenues. If emergencies

⁴⁰ *Goodnow v. Ramsey Co.*, 11 Minn. 31 (Gil. 12); *Police Jury v. Britton*, 15 Wall. (U. S.) 566, 21 L. Ed. 251; *Duke v. Williamsburg Co.*, 21 S. C. 414; *Lewis v. Sherman Co.* (C. C.) 5 Fed. 269; *Curtis v. Leavitt*, 15 N. Y. 9; *Swackhamer v. Hackettstown*, 37 N. J. Law. 191; *Gause v. Clarksville*, 5 Dill. 165, Fed. Cas. No. 5,276; *Robertson v. Breedlove*, 61 Tex. 316; *NASHVILLE v. RAY*, 19 Wall. (U. S.) 468, 22 L. Ed. 164; *Knapp v. Hoboken*, 39 N. J. Law, 394; *Shirk v. Pulaski Co.*, 4 Dill. 209, Fed. Cas. No. 12,794; *Thomas v. Port Huron*, 27 Mich. 320. See, contra, *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *Bank of Chillicothe v. Chillicothe*, 7 Ohio, 31, pt. 2, 30 Am. Dec. 185; *Miller v. Board*, 66 Ind. 162. But see 1 Dill. Mun. Corp. §§ 117, 121-126.

⁴¹ *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *POLICE JURY v. BRITTON*, 15 Wall. (U. S.) 566, 21 L. Ed. 251. See, also, *Lynde v. Winnebago Co.*, 16 Wall. (U. S.) 6, 21 L. Ed. 272, where the county had express legislative authority to borrow money for the erection of public buildings, when authorized by the voters at an election called for the purpose. In *CLAIBORNE CO. v. BROOKS* the court also declared that the power to issue negotiable paper cannot be conceded to counties and townships, which are political divisions, unless it is authorized by express legislation or by very strong implication. See, also, *City of St. Louis v. Alexander*, 23 Mo. 483; *Thompson v. Lee Co.*, 3 Wall. (U. S.) 327, 18 L. Ed. 177; 1 Dill. Mun. Corp. §§ 117-125; *Combs v. Letcher Co.*, 107 Ky. 379, 54 S. W. 177.

arise requiring extraordinary expenditure for the public good, resort must then be had to such extraordinary means as the legislature may provide. Most states have permanent general statutes providing for exigencies of frequent occurrence in the counties, such as the erection of costly public buildings, the purchase of expensive property for public use, the construction of some great public improvement within the sphere of county purposes, and also subscriptions in aid of quasi public corporations. In such cases power to borrow money is generally conditioned upon popular approval by public election. But unless forbidden by the Constitution, the legislature may grant this power without popular consent,⁴² and either by general legislation or by special act in favor of a particular county or class of counties. There are cases, however, holding counties liable for money loaned to the county and used by it strictly for county purposes, notwithstanding the contract was ultra vires; the action in such case not being upon the express contract, but for money had and received to the use of the county.⁴³

⁴² *Allen v. Cerro Gordo Co.*, 34 Iowa, 54; *Crooke v. Davless Co.*, 36 Ind. 320; *Hobart v. Supervisors*, 17 Cal. 23; *Pauly Jail Bldg. & Mfg. Co. v. Commissioners*, 68 Fed. 171, 15 C. C. A. 351; *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787. The Iowa Code provides for the submission to the people of the question of expenditure for a county building of a sum over \$5,000, involving the levy of a tax, and renders the county supervisors incompetent to act in the erection of a building to cost more than that amount. It was held that, where there was money in the county treasury sufficient to pay the expense of the erection of a proposed county building, it is not necessary to submit the question of a tax levy to the people of the county. *Miller v. Merriam*, 94 Iowa, 126, 62 N. W. 689.

⁴³ *Borough of Henderson v. Sibley Co.*, 28 Minn. 515, 11 N. W. 91; *Gray v. Tompkins Co.*, 93 N. Y. 603; *Stamp v. Cass Co.*, 47 Mich. 330, 11 N. W. 183; *State, to Use of Neal, v. Saline Co.*, 48 Mo. 390, 8 Am. Rep. 108; *Argenti v. San Francisco*, 16 Cal. 255; *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *BOARD OF SUP'RS OF SANGAMON CO. v. SPRINGFIELD*, 63 Ill. 66; *Richardson v. County of Grant (C. C.)* 27 Fed. 495; *LYNDE v. COUNTY OF WINNEBAGO*, 16 Wall. (U. S.) 6, 21 L. Ed. 272; *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470.

County Paper.

As a corollary of the above doctrine on borrowing money, it is held that counties cannot issue negotiable paper without legislative authority.⁴⁴ County warrants, in whatever form, drawn by the proper officer upon the county treasurer, or notes or due-bills issued in the current business of the county, evidencing county obligations, are not public securities or negotiable instruments,⁴⁵ and do not, therefore, come within the provision of the law pertaining to those subjects. Generally they are held not to bear interest,⁴⁶ whatever may be their form, and, in the hands of assignees or indorsees, are subject to all defenses, legal and equitable, which the county would have against them in the hands of the original payee.⁴⁷

⁴⁴ *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Goodnow v. Ramsey Co.*, 11 Minn. 31 (Gil. 12); *Kirkbride v. Lafayette Co.*, 108 U. S. 208, 2 Sup. Ct. 501, 27 L. Ed. 705; *Clay v. Nicholas County Court*, 4 Bush (Ky.) 154; *Hawkins v. Carroll Co.*, 50 Miss. 735; *Delaware Co. v. McClintock*, 51 Ind. 325; *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 83, 17 L. Ed. 548; *Clapp v. Cedar Co.*, 5 Iowa, 15, 68 Am. Dec. 678; *Thomson v. Lee Co.*, 3 Wall. (U. S.) 327, 18 L. Ed. 177; *POLICE JURY v. BRITTON*, 15 Wall. (U. S.) 566, 21 L. Ed. 251; *Marshall County Sup'rs v. Cook*, 38 Ill. 44, 87 Am. Dec. 282; *Ball v. Presidio Co.*, 88 Tex. 60, 29 S. W. 1042; *Colburn v. Railroad Co.*, 94 Tenn. 43, 28 S. W. 298.

⁴⁵ *Clark v. Polk Co.*, 19 Iowa, 248; *People v. County*, 11 Cal. 170; *Crawford Co. v. Wilson*, 7 Ark. 214; *Campbell v. Polk Co.*, 3 Iowa, 467; *Board of Com'rs of Floyd County v. Day*, 19 Ind. 450; *International Bank of St. Louis v. Franklin Co.*, 65 Mo. 105, 27 Am. Rep. 261; *CARROLL CO. v. UNITED STATES*, 18 Wall. (U. S.) 71, 21 L. Ed. 771; *Shirk v. Pulaski Co.*, 4 Dill. 209, Fed. Cas. No. 12,794; *Bauer v. Franklin Co.*, 51 Mo. 205; *Ersikine v. Steele Co.*, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; *McPeeters v. Blankenship*, 123 N. C. 651, 31 S. E. 876.

⁴⁶ *Camp v. Knox Co.*, 3 Lea (Tenn.) 199; *Gibson Co. v. Raina*, 11 Lea (Tenn.) 22; *Robbins v. County Court*, 3 Mo. 57; *South Park Com'rs v. Dunlevy*, 91 Ill. 49; *People v. Tazewell Co.*, 22 Ill. 147; *Madison Co. v. Bartlett*, 1 Scam. (Ill.) 67; *Rogers v. Lee Co.*, 1 Dill. 529, Fed. Cas. No. 12,013; *Hollingsworth v. Detroit*, 3 McLean, 472, Fed. Cas. No. 6,613.

⁴⁷ *Garner v. State*, 5 Lea (Tenn.) 216; *Goyne v. Ashley Co.*, 31

COUNTY BONDS.

24. County bonds, when duly authorized by valid statute, and issued by proper county officers in substantial compliance with the terms and conditions of the statute, impose a legal liability upon the county, and, like other negotiable paper, are subject to the rules of the law of negotiable instruments.

The term "county bonds" is commonly used to include all written promises to pay money executed by a county, which, if made by individuals, would be called "promissory notes." The nature and extent of the obligation is shown in the face of the paper. The bond is executed by the county authorities as agents of the county. Their power depends upon the statutes. It may appear in the statute authorizing the issuance of the bonds, and designating the officer appointed to perform this function; or the agency for this purpose may be expressed in the general statutes. Legal appointment of the officer to this duty is essential to the validity of the bonds.⁴⁸ Unless he be the

Ark. 552; *Bauer v. Franklin Co.*, 51 Mo. 205; *United States v. Miller Co.*, 4 Dill. 233, Fed. Cas. No. 15,776; *Shirk v. Pulaski Co.*, 4 Dill. 209, Fed. Cas. No. 12,794; *CARROLL CO. v. UNITED STATES*, 18 Wall. (U. S.) 71, 21 L. Ed. 771; *Gibson Co. v. Rains*, 11 Lea (Tenn.) 22; *County of Ouachita v. Wolcott*, 103 U. S. 559, 26 L. Ed. 505; *Wall v. Monroe Co.*, 103 U. S. 74, 26 L. Ed. 430; *Rio Grande Co. v. Jerome (C. C.)* 18 Fed. 873. See, also, *POLICE JURY v. BRITTON*, 15 Wall. (U. S.) 566, 21 L. Ed. 251; *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Goodnow v. Ramsey Co.*, 11 Minn. 31 (Gil. 12); *Hyde v. Franklin Co.*, 27 Vt. 185; *Erskine v. Steele Co.*, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; *Bardsley v. Steinberg*, 17 Wash. 243, 49 Pac. 499. But they have been held so far negotiable as to render parties indorsing them liable as indorsers. *Campbell v. Polk Co.*, 49 Mo. 214; *State ex rel. Livesay v. Harrison*, 99 Mo. App. 57, 72 S. W. 469.

⁴⁸ *ANTHONY v. COUNTY OF JASPER*, 101 U. S. 693, 25 L. Ed. 1005; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88, 29 L. Ed. 430; *Coler v. City of Cleburne*, 131 U. S. 162, 9 Sup. Ct.

agent of the county for this purpose, he cannot bind his principal. Within the scope of his agency, the county is bound by his official action. Mere irregularities will not affect the validity of the bonds.⁴⁹ The fundamental question is the power of the county to issue the bonds. Having this power, it is the business of the county and its officers to execute it in a proper manner. It is not required of a bona fide purchaser that he shall go outside the record and inquire whether the agent has pursued his instructions, provided his act be within the scope of his authority.⁵⁰ The general doctrines of agency apply to county bonds. If upon their face they appear to be in pursuance of the authority lawfully conferred, a purchaser in good faith may

720, 33 L. Ed. 146; *Chisholm v. Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686. The Supreme Court of Tennessee having decided the board of commissioners of Shelby county to have been an unauthorized and illegal body, it was held, in an action on certain bonds issued by said board, that the power of de facto officers could not be invoked in the plaintiff's aid, as there could be no officers de facto where there is no office de jure, and the facts failed to show any ratification by the county. *NORTON v. SHELBY CO.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. See, also, *DAVIESS CO. v. DICKINSON*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026.

⁴⁹ *Maddox v. Graham*, 2 Metc. (Ky.) 56; *City of San Antonio v. Lane*, 32 Tex. 405; *Danielly v. Cabaniss Co.*, 52 Ga. 211; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173; *Potter v. Lainhart* (Fla.) 33 South. 251; *Otoe Co. v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331.

⁵⁰ *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Cromwell v. Sac Co.*, 96 U. S. 58, 24 L. Ed. 681; *KNOX CO. v. ASPINWALL*, 21 How. (U. S.) 539, 16 L. Ed. 208; *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 28, 33 L. Ed. 261; *Manhattan Co. v. Ironwood*, 74 Fed. 535, 20 C. C. A. 642; *CITY OF EVANSVILLE v. DENNETT*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; *Board of Com'rs of Comanche Co. v. Lewis*, 133 U. S. 198, 10 Sup. Ct. 286, 33 L. Ed. 604. Where refunding bonds, payable to bearer, recite that they are issued in conformity with an act authorizing the county to issue such bonds and provide for retirement of outstanding bonds, a purchaser is not bound to investigate the nature of the refunded indebtedness. *Ashley v. Board of Supervisors of Presque Isle Co.*,

assume compliance with instructions by the agent. The bad faith or misconduct of the duly authorized agent is the misfortune of his principal, and is not visited by the law upon an innocent third party.⁵¹

Authority—Indispensable.

Payment of county bonds is ordinarily resisted (1) for want of authority in the county to execute the bonds; (2) for illegal exercise of the authority. The first objection, if well made, is always fatal.⁵² Even a bona fide holder for value cannot withstand it.⁵³ The bond is void. Ratification cannot validate

8 C. C. A. 455, 60 Fed. 55. See *Territory v. Hopkins*, 9 Okl. 133, 59 Pac. 976. As to recitals other than upon the face of the bonds, as a certificate indorsed on the bond to the effect that the requirements had been complied with in their issuance, see *Bolles v. Perry Co.*, 92 Fed. 479, 34 C. C. A. 478. Where county officers issue their obligations, it will be presumed that they were issued for lawful corporate purposes, within the scope of the officers' powers. *Board of Com'rs of Custer Co. v. De Lana*, 8 Okl. 213, 57 Pac. 162.

⁵¹ *MORAN v. MIAMI CO.*, 67 U. S. 722, 17 L. Ed. 342; *Moultrie Co. v. Bank*, 92 U. S. 631, 23 L. Ed. 631; *TOWN OF COLOMA v. EAVES*, 92 U. S. 484, 23 L. Ed. 579; *Town of Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *DIXON CO. v. FIELD*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173; *Wesson v. Saline Co.*, 73 Fed. 917, 20 C. C. A. 227; *Belo v. Commissioners*, 76 N. C. 489.

⁵² *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Clay v. Nicholas County Court*, 4 Bush (Ky.) 154.

⁵³ *Ogden v. Daviess Co.*, 102 U. S. 634, 26 L. Ed. 263; *WELLS v. PONTOTOC CO.*, 102 U. S. 625, 26 L. Ed. 122; *HARSHMAN v. BATES CO.*, 92 U. S. 569, 23 L. Ed. 747; *Bates Co. v. Winters*, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. Ed. 744; *English v. Chicot Co.*, 26 Ark. 454. The cases in this and the previous note establish the doctrine that the authority to issue bonds for strictly county purposes may be implied from general or special power conferred by statute on the county. Authority to issue bonds in aid of railroads or other works of public nature must be expressly conferred by statute.

it.⁵⁴ Estoppel cannot be invoked to save it.⁵⁵ Unless the state has conferred upon the county authority to impose this liability upon its people and property, the bond places no obligation upon them, and cannot be enforced by any judicial tribunal. Such an unauthorized instrument is, in the view of the law, like a piece of blank paper, and no merit or good faith of the holder can give it vitality or legal obligation. If, therefore, there be no statute or constitutional provision empowering the county to make the bond,⁵⁶ or if the statute be unconstitutional,⁵⁷ or if the purpose for which the bond was executed be purely private,⁵⁸ the bond is void, and the county cannot be held liable upon it.

⁵⁴ *DAVIESS CO. v. DICKINSON*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 631, 27 L. Ed. 669; *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *KELLEY v. TOWN OF MILAN*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77; *Coleman v. Broad River Tp.*, 50 S. C. 321, 27 S. E. 774.

⁵⁵ *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Williamson v. Keokuk*, 44 Iowa, 88; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554; *Town of Douglass v. Bank*, 97 Ill. 228; *Lamolle Val. R. Co. v. Fairfield*, 51 Vt. 257.

⁵⁶ *CLAIBORNE CO. v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Carter Co. v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701; *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 600, 18 Sup. Ct. 788, 42 L. Ed. 1156.

⁵⁷ *GERMAN SAV. BANK v. FRANKLIN CO.*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; *STEINES v. FRANKLIN CO.*, 48 Mo. 167, 8 Am. Rep. 87; *Columbia Co. Com'rs v. King*, 13 Fla. 451; *HARSHMAN v. BATES CO.*, 92 U. S. 569, 23 L. Ed. 747; *WELLS v. PONTOTOC CO.*, 102 U. S. 625, 26 L. Ed. 122; *Ogden v. Davless Co.*, 102 U. S. 634, 26 L. Ed. 263; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667, 26 L. Ed. 1204.

⁵⁸ Cooley, *Const. Lim.* (6th Ed.) pp. 129, 175, 214; *Osborne v. County of Adams*, 106 U. S. 181, 1 Sup. Ct. 168, 27 L. Ed. 129; *SHARPLESS v. PHILADELPHIA*, 21 Pa. 147, 59 Am. Dec. 759; *Baltimore & E. S. R. Co. v. Spring*, 80 Md. 510, 31 Atl. 208, 27 L. R. A. 72; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Weismer v. Douglass Co.*, 64 N. Y. 91, 21 Am. Rep. 586.

Irregularities—Recitals—Estoppel.

The defense of an illegal exercise of authority, though oftener made, is not so easily available. County bonds are commonly made payable to bearer, and many defenses allowed to the county against an original holder cannot be used against a bona fide holder for value. Moreover, defects in execution may be cured by ratification, lost by waiver, or covered by estoppel. The county or the legislature may ratify by subsequent action bonds originally invalid by reason of some irregularity in their execution.⁵⁹ The Legislature may validate an irregular issue of bonds, provided it has constitutional power to authorize an original issuance thereof.⁶⁰ The county, with full knowledge of the facts, may, by long acquiescence and recognition of the obligation, waive any original objection to their irregularity,⁶¹ or by the recitals in the bonds it may estop itself from asserting invalidity arising out of irregular execution.⁶² But the act of

⁵⁹ *STEINES v. FRANKLIN CO.*, 48 Mo. 167, 8 Am. Rep. 87; *Ritchie v. Franklin Co.*, 22 Wall. (U. S.) 67, 22 L. Ed. 825; *Otoe Co. v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173; *Noel Young Bond & Stock Co. v. Mitchell Co.*, 21 Tex. Civ. App. 638, 54 S. W. 284; *Watson v. De Witt Co.*, 19 Tex. Civ. App. 150, 46 S. W. 1061, where the county failed at time of issuance of the bonds to provide for levying a tax for their payment.

⁶⁰ *Grenada County Sup'rs v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704; *Anderson v. Santa Anna Tp.*, 116 U. S. 364, 6 Sup. Ct. 413, 29 L. Ed. 633; *Utter v. Franklin*, 172 U. S. 424, 19 Sup. Ct. 183, 43 L. Ed. 498; *Steele Co. v. Erskine*, 98 Fed. 217, 39 C. C. A. 173; *Sykes v. Columbus*, 55 Miss. 115; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. Ed. 911; *Erskine v. Steele Co.* (C. C.) 87 Fed. 630.

⁶¹ *Heed v. Com'rs of Cowley Co.* (C. C.) 82 Fed. 716; *Presidio Co. v. City Nat. Bank*, 20 Tex. Civ. App. 511, 44 S. W. 1069; *State v. Clinton Co.*, 6 Ohio St. 280; *Ray Co. v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800; *PENDLETON CO. v. AMY*, 13 Wall. (U. S.) 297, 20 L. Ed. 579; *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 781, 18 L. Ed. 556; *Board of Sup'rs of Mercer Co. v. Hubbard*, 45 Ill. 139; *Jasper Co. v. Ballou*, 103 U. S. 745, 26 L. Ed. 422.

⁶² *MORAN v. MIAMI CO.*, 67 U. S. 722, 17 L. Ed. 342; *KNOX*

ratification must be by due authority;⁶³ the waiver must be with knowledge, actual or constructive;⁶⁴ and the act constituting the estoppel must have been performed by officers thereunto legally authorized.⁶⁵ A mayor having no authority to issue bonds has no power to perform an act of ratification,⁶⁶ and officers having no authority to determine or decide whether conditions precedent had been complied with cannot bind the county by recital of such compliance in the face of the bonds executed by them.⁶⁷ A public corporation is not estopped to deny the authority of persons assuming to act for it.⁶⁸ Public officers cannot acquire authority by their own declarations, and

CO. v. ASPINWALL, 21 How. (U. S.) 539, 16 L. Ed. 208; Moultrie Co. v. Bank, 92 U. S. 631, 23 L. Ed. 631; DIXON CO. v. FIELD, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Coffin v. Board of Com'rs of Kearney Co., 57 Fed. 137, 6 C. C. A. 288; BROWN v. BON HOMME CO., 1 S. D. 216, 46 N. W. 173.

⁶³ MARSH v. FULTON CO., 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; DAVIESS CO. v. DICKINSON, 117 U. S. 665, 6 Sup. Ct. 897, 29 L. Ed. 1026; Board of Com'rs of Oxford v. Bank, 96 Fed. 298, 37 C. C. A. 493; STEINES v. FRANKLIN CO., 48 Mo. 176, 8 Am. Rep. 87; NORTON v. SHELBY CO., 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

⁶⁴ McPherson v. Foster, 43 Iowa, 48, 22 Am. Rep. 215.

⁶⁵ BROWN v. BON HOMME CO., 1 S. D. 216, 46 N. W. 173; Coffin v. Kearney Co., 57 Fed. 137, 6 C. C. A. 288; DIXON CO. v. FIELD, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; GERMAN SAV. BANK v. FRANKLIN CO., 128 U. S. 526, 9 Sup. Ct. 155, 32 L. Ed. 519; MORAN v. MIAMI CO., 67 U. S. 722, 17 L. Ed. 342.

⁶⁶ KELLEY v. MILAN, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77.

⁶⁷ DIXON CO. v. FIELD, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Board of Sup'rs of Carroll Co. v. Smith, 111 U. S. 562, 4 Sup. Ct. 539, 28 L. Ed. 517; DAVIESS CO. v. DICKINSON, 117 U. S. 665, 6 Sup. Ct. 897, 29 L. Ed. 1026; Hedges v. Dixon Co., 150 U. S. 188, 14 Sup. Ct. 71, 37 L. Ed. 1044; MERCER CO. v. PROV. LIFE INS. & TRUST CO., 72 Fed. 623, 19 C. C. A. 44; Board of Com'rs of Oxford v. Bank, 96 Fed. 298, 37 C. C. A. 493; Coffin v. Kearney Co., 57 Fed. 137, 6 C. C. A. 288.

⁶⁸ Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146; Merchants' Exch. Nat. Bank v. Bergen Co., 115 U. S. 384, 6 Sup.

a body politic cannot be estopped thereby from denying their authority to bind it.⁶⁹ A bona fide purchaser of a county bond is not charged with constructive notice of objections to the validity of bonds being made by the county in pending litigation,⁷⁰ nor with knowledge of latent defects in the execution or issuance of county bonds;⁷¹ but he is bound to take notice of the Constitution and laws of the state,⁷² and particularly the statute under which the bonds are issued,⁷³ the public

Ct. 88, 29 L. Ed. 430; *BROWN v. BON HOMME CO.*, 1 S. D. 216, 46 N. W. 173.

⁶⁹ *Chisholm v. Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686; *Flagg v. School District*, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; *Lehman v. San Diego*, 83 Fed. 669, 27 C. C. A. 668; *Board of Com'rs of Oxford v. Bank*, 96 Fed. 293, 37 C. C. A. 493; *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *DAVIESS CO. v. DICKINSON*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; *Lewis v. Shreveport*, 108 U. S. 282, 2 Sup. Ct. 634, 27 L. Ed. 728.

⁷⁰ *Board of Sup'rs of Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; *Town of Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523; *Stone v. Elliott*, 11 Ohio St. 252; *Cass Co. v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Winston v. Westfeldt*, 22 Ala. 760, 58 Am. Dec. 278; *Mims v. West*, 38 Ga. 18, 95 Am. Dec. 379.

⁷¹ *KNOX CO. v. ASPINWALL*, 21 How. (U. S.) 539, 16 L. Ed. 208; *State v. Commissioners*, 62 Kan. 494, 64 Pac. 45.

⁷² *MARSH v. FULTON CO.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 391, 6 Sup. Ct. 88, 29 L. Ed. 430; *Barnet v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819, 36 L. Ed. 652; *Moore v. New York*, 73 N. Y. 238, 29 Am. Rep. 134; *Sage v. Fargo Tp.*, 107 Fed. 383, 46 C. C. A. 361; *Stebbins v. Perry Co.*, 167 Ill. 567, 47 N. E. 1048; *Mitchell Co. v. Bank*, 91 Tex. 361, 43 S. W. 880.

⁷³ *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. Ed. 652; *MERCER CO. v. TRUST CO.*, 72 Fed. 630, 19 C. C. A. 44; *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. Ed. 74; *GERMAN SAV. BANK v. FRANKLIN CO.*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; *Mitchell Co. v. Bank*, 91 Tex. 361, 43 S. W. 880.

records in relation to the issue,⁷⁴ and what appears upon the face of the instrument.⁷⁵

Recitals.

As to matters in pais, he may rely for his information upon the recitals contained in the bond—as, for example, if the statute requires popular consent as a condition precedent to the issuance of the bonds, and the county, by its proper officers thereunto duly authorized, recites in the face of the bond a compliance with the statutory conditions, the purchaser is warranted in acting upon this recital.⁷⁶ The rule of decision constantly applied by the Supreme Court of the United States in numerous cases involving this question is thus stated by Mr. Justice Strong: "Where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been made in bonds issued by them and held by a bona fide purchaser is conclusive of the fact, and binding upon the municipality."⁷⁷ And in a later case it was added: "It is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have

⁷⁴ *Shaw v. School Dist.*, 77 Fed. 277, 23 C. C. A. 169; *Valley Co. v. McLean*, 79 Fed. 728, 25 C. C. A. 174; *Supervisors of Marshall Co. v. Cook*, 38 Ill. 44, 87 Am. Dec. 282.

⁷⁵ *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. Ed. 74; *Bolles v. Perry Co.*, 92 Fed. 479, 34 C. C. A. 478.

⁷⁶ *Moultrie Co. v. Bank*, 92 U. S. 631, 23 L. Ed. 631; *DIXON CO. v. FIELD*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *Coffin v. Kearney Co.*, 57 Fed. 137, 6 C. C. A. 288; *Second Ward Sav. Bank v. Huron (C. C.)* 80 Fed. 661; *Smith v. Clark Co.* 54 Mo. 58; *Wilkinson v. Peru*, 61 Ind. 1. Where a county court, under color of an election, issued bonds for aiding a railroad, such bonds were declared void and ultra vires, as being in violation of a constitutional provision forbidding all municipal subscriptions in aid of railroad companies, except where authorized under existing law by vote of the people. *Stebbins v. Perry Co.*, 167 Ill. 567, 47 N. E. 1048.

⁷⁷ *TOWN OF COLOMA v. EAVES*, 92 U. S. 484, 23 L. Ed. 579.

been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify."⁷⁸ In further explication of this subject the same court declared: "The facts which a public corporation is not permitted, as against a bona fide holder, to question in the face of recital in the bond of their existence, are those connected with or occurring out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued."⁷⁹

Excessive Issues.

This recital in the face of the bond of compliance with conditions precedent has been held conclusive even in cases of alleged overissue of bonds, where the law empowers the officers issuing the bonds to decide, on proof of facts aliunde, the value of the county property upon which is to be computed the amount of bonds which the county may lawfully issue;⁸⁰ but where the statute makes reference to some record as evidence of this valuation, such as an assessment roll or a census report, then, notwithstanding a recital in the bond of full compliance with the law, the purchaser is bound to take notice of such facts as the records, referred to for authority in the statute, disclose concerning the valuation of the taxable property.⁸¹

⁷⁸ *Inhabitants of Bernards Tp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. 333, 33 L. Ed. 766.

⁷⁹ *NORTHERN NAT. BANK v. PORTER TP.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258.

⁸⁰ *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *New Providence Tp. v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904.

⁸¹ *Frances v. Howard Co.*, 54 Fed. 487, 4 C. C. A. 460; *Valley Co. v. McLean*, 79 Fed. 728, 25 C. C. A. 174; *Quaker City Nat. Bank v. Nolan Co. (C. C.)* 59 Fed. 660; *Citizens' Bank v. City of Terrell*, 78 Tex. 456, 14 S. W. 1003. See, also, *Rathbone v. Commissioners*, 83 Fed. 125, 27 C. C. A. 477; *Heed v. Commissioners (C. C.)* 82 Fed. 716; *Board of Com'rs of Lake Co. v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167; *Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons*, 173

He is charged with knowledge of the statutory reference to this source of information, and also of the facts therein disclosed; and these records, rather than the recitals in the bonds, will prevail in any contention over their validity based upon allegations of excessive issue.⁵²

U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; *Chaffee County Com'rs v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040. But where the limit of an issue of bonds is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, or they have better access to the information than other persons, and can ascertain the amount with more certainty than strangers, then the bonds will be held valid in the hands of bona fide holders. *Chilton v. Gratton* (C. C.) 82 Fed. 873.

⁵² *Board of Com'rs of Lake Co. v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167; *Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; *Chaffee County Com'rs v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; *Valley Co. v. McLean*, 79 Fed. 728, 25 C. C. A. 174; *Shaw v. School Dist.*, 77 Fed. 277, 23 C. C. A. 169.

The Supreme Court of the United States has necessarily come to be the chief source of the law of public securities, because of the great number of cases hitherto decided by it, and the preference of bondholders for federal decisions bringing nearly all cases of importance into the federal tribunals. County bonds, being negotiable instruments, are generally in the hands of nonresident holders, to whom these courts are open on account of diverse citizenship. Having the choice of forum, they naturally chose the one whose jurisprudence is most acceptable to them. The state Supreme Courts have generally concurred with the federal authority in their decisions. They have not adopted in toto the recital doctrine in its full measure, but have rather heeded the wise monitions of Judge Dillon as to the rules which should prevail with reference to this class of negotiable paper. 1 Dill. Mun. Corp. §§ 549-553. The federal courts hold that the recitals of the bond are sufficient, and, in the hands of a bona fide holder, are conclusive evidence of compliance with the law and with conditions precedent. The state courts consider recitals as only prima facie evidence, and allow proof to show that legal requirements have not been observed. It may safely be assumed that the federal rules will decide nearly every contention over these securities, and probably come to be generally recognized in the state courts, with slight modifications yet to be made by the federal Supreme Court.

FISCAL MANAGEMENT.

- 25. The fiscal management of counties is commonly prescribed with particularity in the general, permanent statutes of the state; and, in matters wherein specific directions are not given, the analogies, rules, and practice of the state government, rather than of private corporations, is favored by the courts.**

Every state has its peculiar form of county organization, created by Constitution and statute, wherein are specified the various officers of the county government, and the duties and functions of each. The assessment, collection, and appropriation of county revenues, and the disposition of county funds, are specifically regulated and directed by those statutes which give to each state its own peculiar rules of fiscal management. But since human foresight cannot provide for every possible contingency, many things are necessarily taken for granted. In the interpretation and application of these statutes the courts are averse to recognizing and following the rules and usages of private corporations,⁸³ but, because of the purely public character and functions of counties, are inclined to conform rather to the rules and usages prevailing in the fiscal management of the state government, wherever practicable.⁸⁴ Most county officers, indeed, charged with fiscal functions, represent both the state and the county, and, in matters of assessment and collection of revenue, perform the same duties for each. The appropriation and disbursement of the county revenue are purely county functions, as is likewise the audit of county claims.⁸⁵

⁸³ *Coles v. Madison Co.*, 1 Ill. 154, 12 Am. Dec. 161.

⁸⁴ *Milam Co. v. Bateman*, 54 Tex. 165; *People v. Power*, 25 Ill. 187.

⁸⁵ *City of Nashville v. Towns*, 5 Sneed (Tenn.) 186; *Tippecanoe Co. v. Lucas*, 93 U. S. 108, 23 L. Ed. 822.

County Claims.

It is a general rule that, before suit can be brought upon any county claim, it must be duly presented for audit.⁸⁶ In some states the rule prevails that the action of the county board of audit is conclusive, unless appealed from, both upon the county and claimant.⁸⁷ In others, it is only prima facie evidence in favor of a claim, and the county may thereafter contest its validity;⁸⁸ while a rejection of the claim by the auditing authority amounts to a mere refusal to pay, and gives the claimant his right of action.⁸⁹

Compensation of County Officers.

County officers are compensated for their services either by salary, fees, or commissions fixed by law. This limit of compensation cannot be transgressed by the county by extra allow-

⁸⁶ *Autauga Co. v. Davis*, 32 Ala. 708; *Board of Sup'rs of Lawrence Co. v. Brookhaven*, 51 Miss. 68; *Board of Com'rs of Sullivan Co. v. Arnett*, 116 Ind. 438, 19 N. E. 299; *Armstrong v. Tama Co.*, 34 Iowa, 309; *McCann v. Sierra Co.*, 7 Cal. 121; *Waitz v. Ormsby Co.*, 1 Nev. 370; *Board of Com'rs of Washington Co. v. Clapp*, 83 Minn. 512, 86 N. W. 775; *Shepard v. Easterling*, 61 Neb. 882, 86 N. W. 941; *Lorsbach v. Lincoln Co. (C. C.)* 94 Fed. 963.

⁸⁷ *Board of Com'rs of Warren Co. v. Gregory*, 42 Ind. 32; *Moser v. Boone Co.*, 91 Iowa, 359, 59 N. W. 39; *Endriss v. Chippewa Co.*, 43 Mich. 317, 5 N. W. 632; *Taylor v. Marion Co.*, 51 Miss. 731. See, also, *State v. Griggsy*, 6 Ohio N. P. 202; *Taylor v. Davey*, 55 Neb. 153, 75 N. W. 553; *Trites v. Hitchcock Co.*, 53 Neb. 79, 73 N. W. 215; *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403; *State v. Headlee*, 18 Wash. 220, 51 Pac. 369. But see *Dean v. Saunders Co.*, 55 Neb. 759, 76 N. W. 450; *Board of Com'rs of Huntington Co. v. Buchanan*, 21 Ind. App. 178, 51 N. E. 939.

⁸⁸ *Leavenworth County Com'rs v. Keller*, 6 Kan. 510; *Ryan v. Dakota Co.*, 32 Minn. 138, 19 N. W. 653; *Abernathy v. Phifer*, 84 N. C. 711; *Jones v. Commissioners*, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710.

⁸⁹ *Gillett v. Lyon Co.*, 18 Kan. 410; *Boswell v. Albany Co.*, 1 Wyo. 235; *Murphy v. Steele Co.*, 14 Minn. 67 (Gil. 51); *Waitz v. Ormsby Co.*, 1 Neb. 370; *Clay Co. v. Chickasaw Co.*, 76 Miss. 418, 24 South. 975.

ance without statutory authority.⁹⁰ The basis of this rule is that the officer has, by taking the office, agreed to perform all the duties of the office, whether prescribed at the date of his induction or subsequently added by statute, for the compensation fixed by law,⁹¹ and that these include all services performed in the line of his official employment.⁹² It has accordingly been held that public corporations cannot lawfully allow extra compensation to attorneys, physicians, and other county officers for extraordinary services rendered by them in the line of their professional and official duty, though they were not foreseen or contemplated at the time of induction into office.⁹³ So, likewise, where service had been rendered by persons in effecting the organization of a county, they cannot be treated as preliminary or quasi officers, nor can they receive compensation for

⁹⁰ *Gillmore v. Lewis*, 12 Ohio, 281; *Albright v. Bedford Co.*, 106 Pa. 582; *Wayne Co. v. Reynolds*, 126 Mich. 231, 85 N. W. 574, 86 Am. St. Rep. 541; *Garfield Co. v. Leonard*, 26 Colo. 145, 57 Pac. 693; *Ellis v. Steuben Co.*, 153 Ind. 91, 54 N. E. 382; *Grant County Com'rs v. McKinley*, 8 Okl. 128, 56 Pac. 1044; *Jones v. Commissioners*, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710; *The Judges' Salary Cases*, 110 Tenn. 370, 75 S. W. 1061, holding statute unconstitutional.

⁹¹ 1 Dill. Mun. Corp. § 233; *Glavey v. U. S.*, 35 Ct. Cl. (U. S.) 242. But see *Id.*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247.

⁹² *Heslep v. Sacramento*, 2 Cal. 580; *Debolt v. Cincinnati Tp.*, 7 Ohio St. 237; *Pillie v. New Orleans*, 19 La. Ann. 274; *Hatch v. Mann*, 15 Wend. (N. Y.) 44; *Hobbs v. Yonkers*, 102 N. Y. 13, 5 N. E. 778; *Brissenden v. Clay Co.*, 161 Ill. 216, 43 N. E. 977.

⁹³ *Henderson Co. v. Dixon*, 63 S. W. 756, 23 Ky. Law Rep. 1204; *Stipler v. Clarion Co.*, 8 Pa. Dist. R. 253; *Morgantown Deposit Bank v. Johnson*, 108 Ky. 507, 56 S. W. 825; *Carroll v. St. Louis*, 12 Mo. 444; *Memphis v. Brown*, 20 Wall. (U. S.) 239, 22 L. Ed. 264; *Callagan v. Hallett*, 1 Calnes (N. Y.) 104; *Preston v. Bacon*, 4 Conn. 471; *Shattuck v. Woods*, 1 Pick. (Mass.) 175; *Smith v. Smith*, 1 Bailey (S. C.) 70. But see, contra, *Huffman v. Greenwood Co.*, 23 Kan. 281; *McBride v. Grand Rapids*, 47 Mich. 236, 10 N. W. 353. *The Judges' Salary Cases*, 110 Tenn. 370, 75 S. W. 1061, declare unconstitutional and void a legislative act authorizing a county to pay additional salary to a judge of the state court sitting in that county only.

services rendered in promoting and completing the county organization.⁹⁴ A de facto officer may lawfully claim and receive official salary until his official right to the office has been adversely decided,⁹⁵ but he cannot maintain an action for salary.⁹⁶ A majority of cases hold that the de jure officer cannot recover from a county the salary paid by it to the de facto officer,⁹⁷ but has his action therefor against the ousted de facto

⁹⁴ Board of Com'rs of Fremont County v. Perkins, 5 Wyo. 166, 38 Pac. 915.

⁹⁵ McVeany v. New York, 80 N. Y. 185, 36 Am. Rep. 600; Steubenville v. Culp, 38 Ohio St. 18, 48 Am. Rep. 417; Michel v. New Orleans, 32 La. Ann. 1084; Parker v. Dakota Co., 4 Minn. 59 (Gil. 30); Brinkerhoff v. Jersey City, 64 N. J. Law, 225, 46 Atl. 170; Atchison v. Lucas, 83 Ky. 451; Manor v. State, 149 Ind. 310, 49 N. E. 160; Sullivan v. Haacke, 5 Ohio N. P. 26. The acts and judgments of a de facto officer are as valid and binding as though performed and rendered by an officer de jure. Dredla v. Baache, 60 Neb. 655, 83 N. W. 916; Morford v. Territory, 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513. See, also, Wilson v. Brown, 58 S. W. 595, 59 S. W. 513, 22 Ky. Law Rep. 708.

⁹⁶ Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Romero v. United States, 24 Ct. Cl. (U. S.) 331. See Farrell v. Bridgeport, 45 Conn. 191; City of Vicksburg v. Groome (Miss.) 24 South. 306.

The charter of Jersey City provided for the appointment of a single person as city attorney. Two persons acted in that capacity as de facto officers. It was held that, while the acts of each were valid with respect to strangers, neither could maintain a suit for official salary. City of Jersey City v. Erwin, 59 N. J. Law, 282, 35 Atl. 948.

⁹⁷ Greeley Co. v. Milne, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 38 Am. St. Rep. 724; Nichols v. MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; Parker v. Dakota Co., 4 Minn. 59 (Gil. 30).

If, during the incumbency of an officer de facto, and before any judgment of ouster has been rendered against him, the city or county of which he is such officer de facto pays him the salary of the office, a very decided preponderance of authorities sustains the position that by means of such payment the right of the officer de jure to collect his salary from such city or county is lost. Auditors of Wayne Co. v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; Shaw v. Pima Co., 2 Ariz. 399, 18 Pac. 273; State ex rel. Nail v. Clarke, 52 Mo. 508; Smith v. Mayor, 37 N. Y. 518; Westberg v. Kansas City, 64 Mo. 493;

officer.⁸⁸ The opposite view has been strongly maintained in municipal decisions in several states.⁸⁹

McVeany v. Mayor, 80 N. Y. 185, 36 Am. Rep. 600; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168; *Steubenville v. Culp*, 38 Ohio St. 23, 43 Am. Rep. 417; *Saline County Com'rs v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171.

If a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county, notwithstanding such payment. *McVeany v. New York*, *supra*.

If none of the salary has been paid to the officer *de facto*, the officer *de jure*, although he performs no duties of the office, may maintain an action against the city and county for the salary and emoluments thereof. *Comstock v. Grand Rapids*, 40 Mich. 397.

A county or municipality which has paid a salary to a *de facto* officer, who performed the duties of the office under color of title, while the right to it was in litigation, cannot be held liable therefor again to another who may thereafter establish his title to the office. *Fuller v. Roberts Co.*, 9 S. D. 216, 68 N. W. 308.

But in Tennessee and California it has been in several cases held that a *de jure* officer can maintain an action against a city, county, or other public body charged with the duty of making payment of the salary office for the payment of such salary, where it has been paid to a *de facto* officer. *City of Memphis v. Woodward*, 12 Helsk. (Tenn.) 499, 27 Am. Rep. 750; *Savage v. Pickard*, 14 Lea (Tenn.) 46; *People v. Smith*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193.

⁸⁸ In an action by a *de jure* officer against a person wrongfully in possession of the office for fees received by the incumbent, plaintiff is entitled to recover the entire amount received by defendant, though the value of defendant's services equals the fees received. *Wenner v. Smith*, 4 Utah, 238, 7 Pac. 293.

If he has in fact received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer *de jure*, in any appropriate form of action. *Douglass v. State*, 31 Ind. 429; *Lawlor v. Alton*, 8 Ir. R. C. L. 160; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52.

An officer *de facto* is not entitled to the salary of the office, and,

⁸⁹ *City of Memphis v. Woodward*, 12 Helsk. (Tenn.) 499, 27 Am. Rep. 750; *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743; *Larsen v. St. Paul*, 83 Minn. 473, 86 N. W. 459. See *Dickerson v. City of Butler*, 27 Mo. App. 9.

County Revenues.

County revenues are generally divided into distinct funds for separate purposes, such as schools, roads, bridges, buildings, and current expenses, and claims allowed are charged to the proper fund and warrants drawn accordingly. The county treasurer can pay a warrant only out of the fund upon which it is drawn; and, if the fund be insufficient or exhausted, he cannot pay out of any other special fund,¹⁰⁰ but may pay out of a general fund in his hands unappropriated for that year, or out of the particular fund collected the ensuing year. Failure to pay the claim on demand authorizes suit and judgment against the county.¹⁰¹

although he may faithfully discharge its duties, he cannot maintain an action against the city or county for the compensation to which he would have been entitled if he were an officer de jure. *McCue v. Wapello Co.*, 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134; *Matthews v. Supervisors*, 53 Miss. 715, 24 Am. Rep. 715; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168.

In *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584, it was held that one elected to an office, but excluded therefrom by an intruder, who collected the fees and emoluments pertaining thereto, may recover against such intruder in an action of indebitatus assumpsit, though he had not previously qualified as such officer by taking the oath and executing the bonds prescribed by law.

In New Jersey an officer de jure cannot recover from an officer de facto the emoluments of office received by the latter while in the discharge of its duties in good faith, and in the belief that he was entitled to the office and its emoluments. *Stuhr v. Curran*, 44 N. J. Law, 181, 43 Am. Rep. 353.

See, also, *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; *Bier v. Gorrell*, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17; *Hunter v. Chandler*, 45 Mo. 452; *Petit v. Rousseau*, 15 La. Ann. 239.

¹⁰⁰ *Campbell v. County Court*, 76 Mo. 57; *People v. Wood*, 71 N. Y. 371; *CLARK v. DES MOINES*, 19 Iowa, 199, 87 Am. Dec. 423; *Pease v. Cornish*, 19 Me. 191.

¹⁰¹ *Cobb Co. v. Adams*, 68 Ga. 51; *Curtis v. Cass Co.*, 49 Iowa, 421; *Taylor v. Marion Co.*, 51 Miss. 731; *CLARK v. DES MOINES*, supra. See *Modoc Co. v. Madden*, 120 Cal. 555, 52 Pac. 812.

TAXATION.

26. The power of taxation is an attribute of sovereignty, and can therefore be exercised only for public purposes, and by officers and agencies created and thereunto authorized by law.

Counties possess only such measure of this power as is expressly conferred upon them by statute for the purposes therein prescribed.

Assessment.

The elements constituting taxation are assessment, levy, and collection. These can be exercised by the county only upon the property and persons within its limits.¹⁰² A single assessment of the property in a county is generally provided by law as the basis of all taxes levied—state, county, and town or township. In states where town and township functions are most important, assessment is made by officers of those organizations constituting the county. In other states the assessment is made by a county officer or county officers. The mode and manner of such assessment are prescribed and regulated by statute law. To insure a just apportionment of the burden of taxation, state and county boards of equalization are provided, which have general authority to correct errors of assess-

¹⁰² Cooley, Const. Lim. (6th Ed.) pp. 615-621; Sangamon & M. R. Co. v. Morgan Co., 14 Ill. 163, 56 Am. Dec. 497; Mills v. Thornton, 26 Ill. 300, 79 Am. Dec. 377; Carrier v. Gordon, 21 Ohio St. 605; Blood v. Sayre, 17 Vt. 609; Wells v. City of Weston, 22 Mo. 384, 66 Am. Dec. 627; Swift v. Newport, 7 Bush (Ky.) 37; Morford v. Unger, 8 Iowa, 82. Injunction will lie, at the suit of a taxpayer, to restrain a county from incurring expense for equipping a free ferry outside the county, it having no authority to establish such a one. Johnston v. Sacramento Co., 137 Cal. 204, 69 Pac. 962. See Northwestern Lumber Co. v. Chehalis Co., 25 Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747; Barnes v. Woodbury, 17 Nev. 383, 30 Pac. 1068; Ford v. McGregor, 20 Nev. 446, 23 Pac. 508; State v. Shaw, 21 Nev. 222, 29 Pac. 321. Also, see Denver & R. G. R. Co. v. Church, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252; Smith v. Mason, 48 Kan. 586, 30 Pac. 170.

ment, to the end that such assessments may be uniform and equal. Errors made by assessments in the ownership or valuation of property are corrected by these boards upon appeal to them, and their decision is generally held to be final.¹⁰³

Levy.

The levy of taxes for county purposes, being a matter peculiarly of local knowledge and interest, is committed by the state to the county board or court, which is empowered to fix the rate of the annual levy.¹⁰⁴ In some states the statutes set no limit upon the amount of the county levy, but commit this subject entirely to the discretion of the county authorities. In others, the amount of the county levy is limited by law—as, for example, that the amount or rate for county purposes shall not exceed that for state purposes. Within this limit, the county authorities have full discretion in making the annual levy for county purposes.¹⁰⁵ This function is legislative, and not judicial, and from the action of the county authorities in fixing this levy there is no appeal.¹⁰⁶ If the limit prescribed by law is transgressed by them, the taxpayers have recourse to the courts to enjoin collection of the excess beyond the law-

¹⁰³ *Fuller v. Gould*, 20 Vt. 643; *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525; *Davis v. Township*, 1 Mich. N. P. 16; *Stewart v. Maple*, 70 Pa. 221; *Smith v. Supervisors*, 30 Iowa, 531; *Bellinger v. Gray*, 51 N. Y. 613; *People v. Nichols*, 49 Ill. 517.

¹⁰⁴ *Burroughs, Tax.*, § 133; *CALDWELL v. JUSTICES*, 57 N. C. 323; *Perry v. Rockdale*, 62 Tex. 457; *STATE v. DENNY*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *Smith v. Aberdeen Corp.*, 25 Miss. 458; *Osborne v. Mobile*, 44 Ala. 493; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103.

See *State v. Headlee*, 22 Wash. 126, 60 Pac. 126.

¹⁰⁵ *Cannon County Justices v. Hoodenpyle*, 7 Humph. (Tenn.) 145; *Smith v. Aberdeen Corp.*, 25 Miss. 458; *Osborne v. Mobile*, 44 Ala. 493; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *Hilliard v. Bunker*, 68 Ark. 340, 58 S. W. 362.

¹⁰⁶ *Grant v. Lindsay*, 11 Helsk. (Tenn.) 666; *Oblon County Court v. Marr*, 8 Humph. (Tenn.) 634. See *Dodge v. Township*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

ful limit, or recover same back from the officer.¹⁰⁷ So, likewise, if the county authorities levy a tax for any purpose not authorized by law.¹⁰⁸ This levy must be made by the board of county authorities in regular session, and entered upon its minutes of the proceeding. This record is a sine qua non of a valid levy.¹⁰⁹ It must specify the several county purposes for which the respective levies are made, composing the aggregate of the county levy.¹¹⁰ The sums received from these various sources constitute separate funds of the county to be applied to the objects specified in the levy.¹¹¹ A levy for a particular purpose by the county authorities amounts to an appropriation of that fund to that purpose, and, unless expressly authorized by statute, such fund cannot be diverted from that purpose by any county board or officer.¹¹²

¹⁰⁷ *Vanover v. Davis*, 27 Ga. 354; *Fleming v. Mershon*, 36 Iowa, 413; *City of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *City of Richmond v. Crenshaw*, 76 Va. 936; *Bright v. Halloman*, 7 Lea (Tenn.) 309. An interested taxpayer may sue to prohibit the negotiability of funds issued by county commissioners for the payment of the construction of a road, based on the ground that the bonds are void, as being in excess of the limit prescribed by law. *Owen County Com'rs v. Spangler*, 159 Ind. 575, 65 N. E. 743. See, also, *Rogers v. Supervisors*, 77 App. Div. 501, 78 N. Y. Supp. 1081.

¹⁰⁸ *Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195; *City of Delphi v. Bowen*, 61 Ind. 29; *Leslie v. St. Louis*, 47 Mo. 474.

In *Grannis v. Board*, 81 Minn. 85, 83 N. W. 495, it was declared that a taxpayer of the county might maintain an action to restrain the performance of an ultra vires contract by the county officials.

See, also, *Franklin v. Baird*, 9 Ohio S. & C. P. Dec. 715, 7 Ohio N. P. 571; *Burness v. Multnomah Co.*, 37 Or. 460, 60 Pac. 1005.

¹⁰⁹ *Moser v. White*, 29 Mich. 59; *Farrar v. Fessenden*, 39 N. H. 268; *People v. Canal Co.*, 48 Cal. 143; *West v. Whitaker*, 37 Iowa, 508. But see *Hilliard v. Bunker*, 68 Ark. 340, 58 S. W. 362.

¹¹⁰ *Cooley*, Const. Lim. (6th Ed.) p. 636; *Kennedy v. Montgomery Co.*, 98 Tenn. 179, 38 S. W. 1075; *Clark v. Davenport*, 14 Iowa, 494; *Simmons v. Wilson*, 66 N. C. 336; *Lott v. Ross*, 38 Ala. 156; *State v. Ashland*, 71 Wis. 502, 37 N. W. 809.

¹¹¹ *Tippecanoe Co. v. Cox*, 6 Ind. 403; *Campbell v. Polk Co.*, 49 Mo. 214; *Boro v. Phillips Co.*, 4 Dill. (U. S.) 216, Fed. Cas. No. 1,663.

¹¹² *Carroll Co. v. United States*, 18 Wall. (U. S.) 71, 21 L. Ed. 771;

Collection.

The collection of county taxes is regulated by the statutes of the state, and is generally made at the same time, in the same way, and by the same officer as the collection of the state revenue. In some states county revenue is collected by the town officer at the same time with, and in the same manner as, the town revenue, and the collection officers of the several towns constituting the county pay over the county portion of the public tax to the county treasurer. This county officer, whether called "treasurer," "trustee," or by any other name, is the legal custodian of the county funds, and disburses the same only upon warrants drawn upon the county treasury by the officer intrusted with the fiscal management of its affairs.¹¹³ Collection of county revenue from delinquent taxpayers is made in pursuance of the general statute of the state regulating this function. This is effected sometimes by enforcement of the tax lien upon the property, and sometimes by process against the owner.¹¹⁴ The methods of assessment, levy, and collection in each state are regulated by the local statutes, and are so various and different in their details as to preclude the possibility of general treatment and consideration, and are too numerous and multiform for the compass of the present work. They can only be known and understood by a very careful study of the revenue statutes of the several states.

Campbell v. Polk Co., 49 Mo. 214; *Nashville, C. & St. L. R. Co. v. Franklin Co.*, 5 Lea (Tenn.) 707; *Nashville, C. & St. L. R. v. Hodges*, 7 Lea (Tenn.) 663; *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554.

¹¹³ A county treasurer cannot be compelled to receive money of which he is not made official custodian, nor to hold money, which he does receive, subject to any condition not imposed upon that fund by statute. *Davis v. Patterson*, 12 Pa. Super. Ct. 479. See *Gartley v. People*, 28 Colo. 227, 64 Pac. 208; *Wilson v. Wichita Co.*, 67 Tex. 647, 4 S. W. 67.

¹¹⁴ 2 Dill. Mun. Corp. §§ 815-822. See *Smith v. Riding*, 9 Houst. (Del.) 22 Atl. 97.

Principles.

The controlling decisions of the courts of the various states only reflect the variety and differences in the systems of taxation, but are themselves sometimes inconsistent and irreconcilable on identical questions. For the most part, however, they concur in recognizing and establishing the following principles in regard to county taxation:

(1) The county must be authorized by statute to levy the tax.¹¹⁵

(2) It must be levied by the county board designated and empowered to perform that function.¹¹⁶

(3) There must be an official record of the levy.¹¹⁷

(4) The tax can be levied only upon persons and property or privileges within the limits of the county.¹¹⁸

(5) The tax must be for a public purpose and a county object.¹¹⁹

(6) There must be an assessment made by the officer or officers lawfully authorized to perform that function.¹²⁰

¹¹⁵ *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Dally v. Swope*, 47 Miss. 367; *LARAMIE CO. v. ALBANY CO.*, 92 U. S. 307, 23 L. Ed. 552; *Thompson v. Lee Co.*, 3 Wall. (U. S.) 330, 18 L. Ed. 177; *CALDWELL v. JUSTICES*, 57 N. C. 323; *City of Philadelphia v. Flanigen*, 47 Pa. 21.

¹¹⁶ *Bright v. Halloman*, 7 Lea (Tenn.) 309; *West v. Whitaker*, 37 Iowa, 598; *Gearhart v. Dixon*, 1 Pa. 224.

¹¹⁷ *People v. Canal Co.*, 48 Cal. 143; *Martin v. Cole*, 38 Iowa, 141; *Farrar v. Fessenden*, 39 N. H. 268; *Moser v. White*, 29 Mich. 59.

¹¹⁸ See note 102.

¹¹⁹ *Louisville & N. R. Co. v. County Court*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *State ex rel. North Missouri C. R. Co. v. County Court*, 44 Mo. 504; *Thompson v. Lee Co.*, 3 Wall. (U. S.) 327, 18 L. Ed. 177; *Hill v. Forsythe Co.*, 67 N. C. 367; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586.

¹²⁰ *Richmond & D. R. Co. v. Brogden*, 74 N. C. 707; *Stokes v. State*, 24 Miss. 621; *Middletown v. Berlin*, 18 Conn. 189; *Granger v. Parsons*, 2 Pick. (Mass.) 392.

(7) There must also be an official record of this assessment.¹²¹

(8) The tax levied must be equal and uniform upon all taxable objects in the county, or, if a local tax, upon all property and persons to be especially benefited thereby.¹²²

(9) The official acts of county officers de facto in matters of taxation are valid and binding.¹²³

LEGISLATIVE CONTROL.

27. Legislative delegation to the county of the inherent taxing power of the state, with the power to appropriate county revenues, may be repealed at any time by the legislature and resumed by the state, provided contractual obligations to third parties are not thereby impaired.

Counties do not acquire vested rights in the powers conferred upon them. As remarked by Nelson, J., in *People v. Morris*,¹²⁴ "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right, as against the government, in any individual or body of men." It has accordingly been held that the legislature may repeal a grant of power to levy and collect wharfage which

¹²¹ *Thurston v. Little*, 3 Mass. 429; *Bailey v. Ackerman*, 54 N. H. 527; *People v. Railroad Co.*, 49 Cal. 414; *People v. Hagadorn*, 104 N. Y. 516, 10 N. E. 891; *Roe v. St. John*, 7 Neb. 139; *Downing v. Roberts*, 21 Vt. 441.

¹²² *City of East Portland v. Multnomah Co.*, 6 Or. 62; *Sanborn v. Rice Co.*, 9 Minn. 273 (Gil. 258); *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis. 37, 8 N. W. 833; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

¹²³ *State v. Jacobs*, 17 Ohio, 143; *Laver v. McGlachlin*, 28 Wis. 364; *Scoville v. Cleveland*, 1 Ohio St. 126; *Rutledge v. Fogg*, 3 Cold. (Tenn.) 554, 91 Am. Dec. 209; *Cushing v. Frankfort*, 57 Me. 541; *Washington Co. v. Miller*, 14 Iowa, 584; *Scott v. Watkins*, 22 Ark. 504.

¹²⁴ 13 Wend. (N. Y.) 335.

had been pledged by the corporation, together with other revenues for the payment of bonds issued to obtain money to maintain and improve the wharf;¹²⁵ and generally it is said that the legislature has the same power over the revenues of a county as over the immediate funds of the state.¹²⁶ And so in regard to a fund set apart for disabled officers, it was said by Mr. Justice Field in *Pennie v. Reis*:¹²⁷ "The direction of the state that the fund should be for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time at the will of the legislature. There was no contract on the part of the state that its disposition should always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, was to be paid, there was no vested right in the officers to such payment." It has likewise been held that the legislature may require a county to deliver a certain portion of its revenue levied and collected for county purposes to a municipality within its borders to be used for street repairs, even though the Constitution of the state forbade the legislature to authorize counties to levy taxes for any other than county purposes.¹²⁸ So, also, it has been held competent for the legislature to direct restitution to the taxpayer of all property exacted from him by taxation, into whatever form the property may have been changed, so long as it remained under the control of the corporation.¹²⁹ In California it has been held that the legislature may refuse to provide funds to pay an existing indebtedness of the county, and may provide a county fund out of which the holders of the county paper may obtain fifty per cent. of the face value of the same when-

¹²⁵ *City of St. Louis v. Shields*, 52 Mo. 351.

¹²⁶ *Duval County Com'rs v. Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416; *Richland Co. v. Lawrence Co.*, 12 Ill. 1.

¹²⁷ 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426.

¹²⁸ *Duval County Com'rs v. Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416.

¹²⁹ *Tippecanoe Co. v. Lucas*, 93 U. S. 108, 23 L. Ed. 822.

ever the county may choose to approve it.¹³⁰ But a county owing a debt of moral obligation to another county for certain expenses previously incurred may be compelled by act of legislation to satisfy the claim.¹³¹ So, also, a county may be compelled by the legislature to levy taxes to build and maintain a bridge over a stream within its boundaries,¹³² to improve levees,¹³³ and even to issue bonds for the purpose of raising money to be expended in the construction and maintenance of highways within its limits.¹³⁴ The courts have likewise in numerous instances maintained that it is competent for the legislature to compel a public corporation to levy a tax to pay to an individual a debt which is just and honorable, though not binding in law, nor even enforceable in equity.¹³⁵

¹³⁰ *People v. Morse*, 43 Cal. 534.

¹³¹ *Lycoming Co. v. Union Co.*, 15 Pa. 166, 53 Am. Dec. 575.

¹³² *Carter v. Proprietors*, 104 Mass. 236.

¹³³ *Eastern S. A. R. Co. v. Railroad Co.*, 52 N. J. Law, 267, 19 Atl. 722.

¹³⁴ *Jensen v. Board*, 47 Wis. 298, 2 N. W. 320; *People v. Board*, 50 Cal. 561.

¹³⁵ *TOWN OF GUILFORD v. SUPERVISORS*, 13 N. Y. 144; *People v. Supervisors*, 70 N. Y. 228; *People v. Burr*, 13 Cal. 343; *CITY OF NEW ORLEANS v. GASLIGHT CO.*, 95 U. S. 644, 24 L. Ed. 521; *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542; *Hasbrouck v. Milwaukee*, 21 Wis. 219, *State v. Hampton*, 13 Nev. 441; *Vasser v. George*, 47 Miss. 713; *Sanborn v. Rice Co.*, 9 Minn. 273 (Gil. 258).

In the leading case above cited, of *TOWN OF GUILFORD v. SUPERVISORS*, the claim had been expressly rejected by the voters at an election authorized by special act of the Legislature, which declared that their action should be final and conclusive. Judge Cooley justifies the legislative action in this case upon the ground that it is the right and duty of the state to see that the powers which it confers upon public corporations are not abused to the injury of those who have relied upon them, and to prevent repudiation by them of their just obligations. Cooley, *Tax'n* (2d Ed.) 685.

For an elaborate opinion holding the contrary view, see *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

CHAPTER IV.

QUASI CORPORATIONS (Continued):

28. Quasi Corporations Other than Counties.
29. New England Towns.
30. Townships.
31. School Districts.
32. Other Local Quasi Corporations.
33. Boards—Commissioners—Companies.

QUASI CORPORATIONS OTHER THAN COUNTIES.

28. Within the class of public quasi corporations are included, besides counties, all involuntary political subdivisions of the state made for the convenience and efficiency of civil administration, and also all public organizations of officers clothed with governmental authority, and charged with the performance of public duties.

Two elements enter into the consideration of a quasi corporation—territory and persons.¹ A corporation being a body of individuals, the latter element is the essential one. Distinct territorial limits, if not absolutely essential, will generally be found in every such corporation. The town, township, school district, road district, and drainage district are familiar illustrations of minor quasi corporations;² and in general it may be said that whenever the legislature lays off a distinct subdivision of the state, either under general or special law, for some particular governmental purpose or purposes, without the request or consent of the inhabitants, and invests them with the powers necessary therefor, a

¹ Dill. Mun. Corp. § 40; Cooley, Const. Lim. (6th Ed.) p. 294.

² HARRIS v. SCHOOL DIST., 8 Fost. (N. H.) 58; Beach v. Leahy, Kan. 23; Inhabitants of Fourth School Dist. v. Wood, 13 Mass. 183; Littlewort v. Davis, 50 Miss. 403; Bassett v. Fish, 75 N. Y. 303

quasi corporation is thereby created.³ Again, whenever the legislature creates for any governmental purpose a board of officers, and charges them with the performance of public duties, whether for the state at large, or some portion thereof, such as a county, or a district embracing more or less than a county, a town or township, or a municipality, such board is generally treated as a quasi corporation. Illustrations of this are to be found in boards of education, of public works, boards of railroad and warehouse commissioners, and sanitary commissions.⁴ Where these public functions are performed by a single person, he is generally called an officer, though in Tennessee it has been ruled that the Governor is a quasi corporation sole.⁵ But consistently with the logical conception of a corporation—that it is a body of individuals organized under law for a distinct and definite purpose—the courts usually treat a public board of officers, whether municipal, county, or state, if it be specially created for a particular governmental purpose, as a quasi corporation.⁶ For convenience, these minor quasi corporations will be considered briefly in two groups: (a) those wherein the local subdivision is the prominent feature; (b) governmental boards or commissions.

³ *School Town of Princeton v. Gebhart*, 61 Ind. 187; *CITY OF GALVESTON v. POSNAINSKY*, 62 Tex. 118, 50 Am. Rep. 517; *Fourth School Dist. v. Wood*, 13 Mass. 193; *Cooley*, Const. Lim. (6th Ed.) pp. 294, 295.

⁴ A board of public works of a city is a quasi corporation, and the nature of its duties, laying out streets, establishing grades, sewers, etc., requires it to keep a record of its proceedings, although no such record is in terms provided for. *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22; *People v. Harper*, 91 Ill. 357; *Levy Court v. Coroner*, 2 Wall. (U. S.) 501, 17 L. Ed. 851; *Lower Board of Com'rs of Roads v. McPherson*, 1 Speers (S. C.) 218; *Scioto Com'rs v. Gherky Wright* (Ohio) 493.

⁵ *POLK v. PLUMMER*, 2 Humph. 500, 37 Am. Dec. 566; *Governor v. Allen*, 8 Humph. 178; *Felts v. Mayor of Memphis*, 2 Head, 656.

⁶ *Elliott*, Mun. Corp. § 252; *Board of El Paso County Com'rs v. Bish*, 18 Colo. 474, 33 Pac. 184; *White v. Charleston*, 2 Hill (S. C.) 571; *CITY OF DETROIT v. BLACKEBY*, 21 Mich. 84, 4 Am. Rep. 450.

NEW ENGLAND TOWNS.

- 29. The New England town, as the political unit of the state, closely resembles counties in other states, in character, powers, and organization. Being the most highly organized of all quasi corporations, it possesses in addition most of the characteristics of a municipality, and thus in many respects is controlled by the law of municipal corporations.**

The New England town has been the subject of much legal discussion and judicial decision, as well as political panegyric. Though not of identical nature or uniform powers in the several New England states, it is recognized as of superior importance to the county in all of them.⁷ The town is a constituent element of the county, not a subdivision of it. It is older than the county, and in Rhode Island is claimed to be older than the state.⁸ It is the germ of political and social organization. From the beginning it has claimed and exercised governmental powers for the support of churches and schools, as well as the preservation of peace and order, the construction and care of public roads and bridges, and the support of the poor.⁹ Only the sovereign functions of government were left by this masterful community to the colony or the state, and even some of them it was inclined to exercise. The people governed, not by delegates or representatives, but in person in their annual assemblies.¹⁰ At these town meetings they determined the objects for which the town should appropriate

⁷ Dill. Mun. Corp. § 28.

⁸ See Arn. Hist. c. 7.

⁹ Dill. Mun. Corp. § 30; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *ALLEN v. TAUNTON*, 19 Pick. (Mass.) 485; *Burrill v. Boston*, 2 Chff. 590, Fed. Cas. No. 2,198.

¹⁰ "The marked and characteristic distinction between a town organization and that of a city is that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities, whereas in a city government this is all done by their representatives." *WARREN v. CHARLESTOWN*, 2 Gray (Mass.) 101.

money, levied the taxes therefor, and chose officers to manage all their affairs.¹¹ Some towns exercised special powers not claimed by others. The general statutes of the several states have specified the powers to be exercised by the towns, and are to be regarded generally as the measure and enumeration of those powers.¹² They are not, however, held to be exclusive, but in several instances the New England courts have

¹¹ Justice Gray, in *Town of Bloomfield v. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923, said: "The annual election of town officers, or any other act which the statutes require to be done by the inhabitants at each annual meeting, might perhaps be sufficiently proved by what was done at the meeting, without proving a special notice of it in the warning. But with these exceptions, such a notice is a necessary prerequisite to the validity of any act of the town either at annual meetings or at a special meeting."

See Cooley, *Const. Lim.* (6th Ed.) p. 221, note.

¹² "Towns in Connecticut, as in the other New England states, differ from trading corporations, and even from municipal corporations elsewhere. They are territorial corporations, into which the state is divided by the legislature from time to time, at its discretion, for political purposes and the convenient administration of the government; they have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs, and all the inhabitants of the town are members of the quasi corporation." *Town of Bloomfield v. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923.

See *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Hooper v. Emery*, 14 Me. 375; *Coolidge v. Brookline*, 114 Mass. 592.

Likewise, Chief Justice Perley, of New Hampshire, in a leading case, declared: "Towns are general, political, and territorial divisions of the county, with uniform powers and duties, defined and varied from time to time by general legislation. Towns in New England do not hold their powers ordinarily under any grant of the government to the individual corporation, or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which have imposed their public duties or fixed their territorial limits." *EASTMAN v. MEREDITH*, 36 N. H. 284, 72 Am. Dec. 302.

And Chief Justice Shepley, in *Hooper v. Emery*, 14 Me. 375, says: "The inhabitants of every town in this state are declared to be a body politic and corporate by the statute; but these corporations de-

ruled that a power might exist in a town by usage or prescription.¹³

Statutory Town Functions.

The principal statutory powers ordinarily exercised by a New England town are

- (1) To sue and be sued in the corporate name and capacity;
- (2) To acquire and hold real estate and personal property for the public use of the inhabitants, and also in trust for the support of the town schools, and to promote education therein;
- (3) To make contracts for the exercise of the corporate powers, and to dispose of corporate property;
- (4) To appropriate out of town revenues money for the following purposes: (a) Support of town schools; (b) care of the poor; (c) construction and repair of highways and bridges; (d) the destruction of noxious animals; (e) purchase and care of cemeteries; (f) the writing and publication of town histories, and the erection of buildings or monuments to the memory of soldiers and sailors; (g) all other necessary charges arising in the town government;¹⁴
- (5) To levy and collect taxes for town purposes;
- (6) To enact town ordinances.¹⁵

rive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated quasi corporations, and their whole capacity, powers, and duties are derived from legislative enactment."

These and kindred declarations of the law by the New England judges seem plainly to authorize the statement of the text that these towns are not municipal, but quasi, corporations. And yet it is not easy to distinguish the Massachusetts town from the ordinary municipality, when we consider its powers as declared by the Massachusetts General Statutes of 1860, whereby they are declared to be bodies corporate, with the powers enumerated in the text.

¹³ Willard v. Newburyport, 12 Pick. (Mass.) 227; Spaulding v. Lowell, 23 Pick. (Mass.) 71.

¹⁴ 1 Dill. Mun. Corp. (4th Ed.) p. 47, note; Rutland v. West Rutland, 68 Vt. 155, 34 Atl. 422.

¹⁵ Easthampton v. Hill, 162 Mass. 302, 38 N. E. 502; Lovell v. ING. CORP.—7

Town Meetings.

The annual town meeting is held at an appointed time, either in the spring or fall. It is composed of the qualified voters of the town. Special town meetings may be called on due notice by the selectmen or other statutory authority. At the annual meeting it is competent to elect the town officers for the ensuing year, levy the annual taxes, make appropriations for town purposes, and transact any other corporate business. At the special meeting only such business may be transacted as is expressed in the warrant calling the meeting. The selectmen constitute the governing board, and the officers are a town clerk, treasurer, collector, assessors, constables, and others of less importance.¹⁶ "Towns are subject by the common law to an indictment for neglect of duties enjoined upon them, but are not liable to an action for such neglect unless the action be given by some statute."¹⁷

TOWNSHIPS.

30. The township is a subdivision of a county vested with certain functions of local government, closely correlated with the county government, and less highly organized than the New England town.

The township exists as an agency of the state government in a few of the Eastern states, in all of the Western states, from Ohio to the Pacific Ocean, and in a few of the states of the South. Its officers consist of a board of supervisors or trustees, in lieu of selectmen, with others the same as in the

Charlestown, 66 N. H. 584, 32 Atl. 160. See *State v. Hoff* (Tex. Civ. App.) 29 S. W. 672; *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183.

¹⁶ 1 Dill. Mun. Corp. (4th Ed.) p. 48, note 2. Relative to necessity for specification in warrant calling special meeting of such business as can be transacted at such meeting, see *Smith v. Town of Westerly*, 19 R. I. 437, 35 Atl. 526; *Arnold v. Price*, Id. But see *Mowry v. Mowry*, 20 R. I. 74, 37 Atl. 306.

¹⁷ *MOWER v. LEICESTER*, 9 Mass. 247, 6 Am. Dec. 63.

New England towns. It possesses only such functions and powers, and is subject to such liabilities only, as are provided by statute.¹⁸ It is not governed by town meeting, but by a board of supervisors or trustees and the officers chosen at annual election. It is not so old as the county, but is organized within it under the government survey made generally by the federal government previous to its settlement. In the general plan of survey of the public lands of the United States a township is a division of territory six miles square, containing thirty-six sections, of which section sixteen is devoted to the public schools.¹⁹ Generally in the Western states the government survey is the basis of the state organization of a township; but in some of the states, as in Tennessee, there are no quasi corporations of this name, although a considerable portion of the territory was surveyed by the general government in township form. The duties of the township officers are prescribed by general statute, and sometimes they are expected and required to perform county and even state functions. The statutes creating, organizing, and regulating townships in the various states are not identical; but they are so nearly alike as to give general uniformity to this agency of government in all the states where it exists.

Township Bonds.

Many cases have been before the Supreme Court of the United States, involving the validity of township bonds issued under the statutes of different states empowering townships to subscribe in aid of the construction of railroads and other public improvements, in which the powers, functions, and fiscal

¹⁸ *Town of Bloomfield v. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923; *Hooper v. Emery*, 14 Me. 375; *Vall v. Amenla*, 4 N. D. 239, 59 N. W. 1092. See, also, *Doolittle v. Walpole*, 87 N. H. 554, 38 Atl. 19; *Shoe v. Township of Nether Providence*, 3 Pa. Super. Ct. 137, 39 Wkly. Notes Cas. 437; *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258, 71 N. W. 1069; *Mueller v. Town of Cavour*, 107 Wis. 599, 83 N. W. 944.

¹⁹ *Rev. St. U. S. § 2395* [U. S. Comp. St. 1901, p. 1471].

management of these quasi corporations received careful examination at the hands of this great tribunal. The general result of these decisions has been to place townships, in the matter of their contracts and liabilities, upon substantially the same footing with counties; and to hold that township bonds, as to the power and regularity of issuance, the authority of officers, the effect of recitals in the bond, and the duty of the purchaser to take notice of constitutional and statutory provisions, are controlled by the same general principles of law as those applicable to county bonds, as hereinbefore explained.²⁰

SCHOOL DISTRICTS.

31. School districts are the most numerous and universal of all the local subdivisions of the state made for public purposes, and belong to the lowest of the quasi corporations in the scale of organization.

Nearly every town, township, and civil district in the United States is subdivided into school districts, which are created and organized for the purpose of establishing and maintaining the free public school system of the state. Their powers and functions are generally uniform in each state, but not in the several states.²¹ In nearly all the states provisions are made

²⁰ Ante, § 24, and notes; *HARSHMAN v. BATES CO.*, 92 U. S. 569, 23 L. Ed. 747; *Cass Co. v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Pompton Tp. v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803; *Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 83; *TOWN OF OREGON v. JENNINGS*, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. Ed. 323; *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; *Folsom v. Ninety-Six*, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; *Kreger v. Township of Bismarck*, 59 Minn. 3, 60 N. W. 675; *Robinson v. Fowler*, 80 Hun, 101, 30 N. Y. Supp. 25; *Rathbone v. Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674.

²¹ In the Dakotas the school district is expressly constituted a body corporate by the provisions of the statutes. In Michigan and Arkansas the courts declare the school district a body corporate, with power to seek relief in equity. *School Dist. No. 3 v. School Dist.*, 63 Mich. 51, 29 N. W. 489; *School Dist. No. 3 v. Bodenhamer*, 43

for different kinds of school districts, applicable to urban and rural population, and the peculiar method of operation of these quasi corporations depends upon the school statutes enacted in the several states. Generally the organization consists of a board of commissioners or school trustees for each district, chosen by the people, and invested with the power of selecting the teachers for the school or schools of the district, fixing the salary, auditing the teachers' claims therefor, and giving the warrant upon the school fund for paying the same. They are also the custodians of the schoolhouses and other school property of the district, and empowered by law to erect new school buildings when necessary, and to purchase school supplies for their district. The boundaries of the school district are fixed in some states by the legislature, in others by the county government, and yet in others by the town or township government, as the Constitution may provide. The school funds are kept in some states in the county treasury, in others in the town or township treasury, and in others by the treasurer of the school district.

Existence—Management.

It has been held that the existence of a school district may be proved by prescription.²² All that is necessary in such a case is to show that the district has long been in existence,

Ark. 140. In Kansas it is declared to be a quasi corporation, and this is the current opinion. *Beach v. Leahy*, 11 Kan. 23. And to the same effect are *People v. School Trustees*, 78 Ill. 136; *Littlewort v. Davis*, 50 Miss. 403; *School Dist. No. 7 v. Thompson*, 5 Minn. 280 (Gil. 221); *School Dist. No. 3 v. Mocloon*, 4 Wis. 79; *Wharton v. School Directors*, 42 Pa. 358; *Rapelye v. Van Sickler*, 1 Edm. Sel. Cas. (N. Y.) 175. See *Holmes & Bull Furniture Co. v. Hedges*, 13 Wash. 696, 43 Pac. 944.

²² *Halfway River School Dist. v. Bradley*, 54 Conn. 74, 5 Atl. 861; *Sherwin v. Bugbee*, 16 Vt. 439; *Bassett v. Porter*, 4 Cush. (Mass.) 487; *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489; *Roble v. Sedgwick*, 35 Barb. (N. Y.) 319.

As to power of school district to issue bonds, see *Holliday v. Hilderbrandt*, 97 Iowa, 177, 66 N. W. 89; *Hamilton v. San Diego Co.*,

and has been publicly known and recognized as such.²³ They have no powers derived from usage, but only the powers expressly granted to organizations of this class, and such implied powers as are necessary to enable them to perform their functions.²⁴ They may also be given corporate character and status by implication.²⁵ In determining the question whether the school district, or its officers, possess a particular power under statute, the courts lean towards a strict construction of the law;²⁶ but, where the power is obviously conferred, such liberal interpretation is given as will further the end in view.²⁷

108 Cal. 273, 41 Pac. 305; *Applegate v. Board*, 58 N. J. Law, 347, 33 Atl. 923. Also, *Jamison v. School Dist.* (C. C.) 90 Fed. 387.

On the subject of organization of school districts, see *State v. Duerr*, 11 Ohio Cir. Ct. R. 303; *Board of Sup'rs of Bedford Co. v. High School*, 92 Va. 292, 23 S. E. 299; *School Dist. No. 4 v. Smith*, 90 Mo. App. 215.

²³ *HARRIS v. SCHOOL DIST.*, 28 N. H. 58; *Conklin v. School Dist.*, 22 Kan. 521.

²⁴ *Willson v. School Dist.*, 32 N. H. 118; *Beach v. Leahy*, 11 Kan. 30; *Scales v. Chattahoochee Co.*, 41 Ga. 225; *Rogers v. People*, 68 Ill. 154.

Where a statute requires that a contract be in writing, a school district cannot be made liable on an implied contract for the value of services of a janitor in sweeping a district schoolhouse and keeping fires therein. *Taylor v. School Dist.*, 1 Mo. App. Rep'r, 98, 60 Mo. App. 372.

²⁵ 1 Dill. Mun. Corp. § 43; *Inhabitants of Fourth School Dist. v. Wood*, 13 Mass. 193.

²⁶ *Rogers v. People*, 68 Ill. 154; *HARRIS v. SCHOOL DIST.*, 28 N. H. 58; *Beach v. Leahy*, 11 Kan. 30; *Scales v. Chattahoochee County*, 41 Ga. 225; *Black v. Cornell*, 30 Mo. App. 641; *Weitz v. Independent Dist.*, 79 Iowa, 423, 44 N. W. 696; *Parr v. Greenbush*, 72 N. Y. 463; *Farmers' & Merchants' Nat. Bank v. School Dist.*, 6 Dak. 255, 42 N. W. 767.

²⁷ *Sanborn v. School Dist.*, 12 Minn. 17 (Gil. 1); *Hazen v. Lerche*, 47 Mich. 626, 11 N. W. 413; *White v. School Dist.* (Pa.) 8 Atl. 443; *School Dist. v. Bennett*, 52 Ark. 511, 13 S. W. 132; *State v. Tiedemann*, 69 Mo. 515; *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758; *Sullivan v. School Dist.*, 39 Kan. 347, 18 Pac. 287.

See *Singleton v. Austin*, 27 Tex. Civ. App. 88, 65 S. W. 686; *Kraft*

School districts must, however, perform their functions in the manner pointed out by law; and so, where the statute requires a written contract, an oral contract cannot be proven.²⁸ Nor is a teacher's contract valid for a greater time than that authorized by statute.²⁹ In regard to contracts for school supplies, the same general rule prevails as in other corporations. If the directors transgress the limit of their authority in making such a contract, the contract is invalid, and cannot be enforced over the objection of the district.³⁰ But if supplies or teacher's services have been received and used for the benefit of the school, an action of assumpsit will lie

v. Board, 67 N. J. Law, 512, 51 Atl. 483; *Stevens v. Campbell*, 26 Tex. Civ. App. 213, 63 S. W. 161.

²⁸ *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Waltz v. Independent Dist.*, 79 Iowa, 423, 44 N. W. 696; *Capital Bank v. School Dist.*, 1 N. D. 479, 48 N. W. 363; *School Town of Milford v. Powner*, 126 Ind. 528, 26 N. E. 484; *Cleveland v. Amy*, 88 Mich. 374, 50 N. W. 293; *Roseboom v. School Tp.*, 122 Ind. 377, 23 N. E. 796; *Black v. Cornell*, 30 Mo. App. 641.

A statute provided that contracts with school districts should be in writing. An oral contract with a teacher to conduct the school for a month after the expiration of his written contract was held to be unenforceable, though such teacher had performed the services. *Hutchins v. School Dist.*, 128 Mich. 177, 87 N. W. 80.

Under a statute providing that no city, school township, or school district shall make any contract unless it is in writing and subscribed by the parties, all contracts for the employment of teachers in public schools must be so executed. *Wetmore v. Board*, 86 Mo. App. 362; *Faulk v. McCartney*, 42 Kan. 695, 22 Pac. 712.

²⁹ *White v. School Dist. (Pa.)* 8 Atl. 443; *School Com'rs of Washington Co. v. Wagaman*, 84 Md. 151, 35 Atl. 85; *Doss v. Wiley*, 72 Miss. 179, 16 South. 902; *Hill v. Swinney*, 72 Miss. 248, 16 South. 497.

But see, contra, *School Town of Milford v. Zeigler*, 1 Ind. App. 133, 27 N. E. 303.

³⁰ *Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755; *School Dist. v. Bennett*, 52 Ark. 511, 13 S. W. 132; *Barry v. Goad*, 89 Cal. 215, 26 Pac. 785; *School Dist. No. 18 v. Brown*, 2 Kan. App. 309, 43 Pac. 102; *State v. Freed*, 10 Ohio Cir. Ct. R. 294, 3 Ohio Dec. 314.

for the value of goods or services so had and received.²¹ Irregular or unauthorized contracts may be ratified and validated, either by special resolution of the board or by acquiescence.²²

Directors.

The board of school directors is constituted by law the general agency for the management of the affairs of the school district. Their powers are generally prescribed in the school law. They have general direction over the schools of the district. In matters of fundamental importance, such as changing the district boundaries or incurring obligations for extraordinary expenses, they are usually required to obtain an expression of popular consent by public election.²³ In

²¹ *Davis v. School Dist.*, 81 Mich. 214, 45 N. W. 989; *School Town of Milford v. Powner*, 126 Ind. 528, 26 N. E. 484; *Hull v. School Dist.*, 82 Iowa, 686, 46 N. W. 1053, 10 L. R. A. 273; *Cobb v. School Dist.*, 63 Vt. 647, 21 Atl. 957; *Andrews v. School Dist.*, 37 Minn. 96, 33 N. W. 217.

A salesman of school apparatus induced a majority of the school board to sign a contract for the purchase of school supplies. Each member signed the contract separately and without consultation with the others. No deceit was used in obtaining the signatures of the various members. The supplies were accepted and used by the district, and it was sought to charge the district with payment therefor. Held that, even if the circumstances attending the execution of the contract rendered it opposed to public policy, the acceptance and retention of the benefit by the district prevented it from taking advantage of such objection. *Johnson v. School Corp.*, 117 Iowa, 319, 90 N. W. 713.

²² *Trustees of Schools of Tp. 24 v. Trustees*, 81 Ill. 470; *Everts v. District Tp.*, 77 Iowa, 37, 41 N. W. 478, 14 Am. St. Rep. 264; *Norris v. School Dist.*, 12 Me. 293, 28 Am. Dec. 182; *Rowell v. School Dist.*, 59 Vt. 658, 10 Atl. 754; *Johnson v. School Corp.*, 117 Iowa, 319, 90 N. W. 713. See *First Nat. Bank v. Felknor* (Tenn. Ch. App.) 48 S. W. 392.

²³ *Black v. Cornell*, 30 Mo. App. 641; *Capital Bank v. School Dist.*, 1 N. D. 479, 48 N. W. 363; *Gentle v. Board*, 73 Mich. 40, 40 N. W. 928; *Smith v. Proctor*, 53 Hun, 143, 6 N. Y. Supp. 212; *Briggs v. Borden*, 71 Mich. 87, 38 N. W. 712.

The officers of a school district cannot by contract create a dis-

the management of current affairs of the district, however, they are vested with full discretion within the limits of the annual school appropriation.³⁴ Unless the statute confers the authority upon some other officer or board, it is their duty, besides employing the teacher, to prescribe the curriculum, and adopt the text-books to be used, and purchase the necessary school supplies.³⁵ They do not possess the implied powers of directors of private corporations,³⁶ but their regular contracts within the limits of their authority are binding upon the district.³⁷

trict liability for the building of a schoolhouse, unless first authorized to do so, and a site selected, and out of the funds provided for that purpose by the electors of the district. *School Dist. No. 80 v. Brown*, 2 Kan. App. 309, 43 Pac. 102. See *Barrett v. Coleman*, 12 Tex. Civ. App. 663, 35 S. W. 418; *Stadtler v. School Dist.*, 61 Minn. 259, 63 N. W. 638; *People v. Keechler*, 194 Ill. 236, 62 N. E. 525. Also, *Hale v. Brown*, 70 Ark. 471, 69 S. W. 260.

As to control of school property, see *Bender v. Streabich*, 17 Pa. Co. Ct. R. 609.

³⁴ *Jefferson School Tp. v. Litton*, 116 Ind. 467, 19 N. E. 323; *Macklin v. Trustees*, 88 Ky. 592, 11 S. W. 657; *People v. McFall*, 26 Ill. App. 319.

³⁵ *Hanover School Tp. v. Gant*, 125 Ind. 557, 25 N. E. 872; *Witthrop v. Board*, 7 Pa. Co. Ct. R. 451; *Fatout v. School Com'rs*, 102 Ind. 223, 1 N. E. 389; *State v. Board*, 35 Ohio St. 368; *State v. School Dist.*, 31 Neb. 552, 48 N. W. 393; *Campana v. Calderhead*, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277.

In *State v. Freed*, 10 Ohio Cir. Ct. R. 294, 3 Ohio Dec. 314, it was held that the expression "all the necessary apparatus" did not include philosophical apparatus for the demonstration of different branches of education. See, also, *Honaker v. Board*, 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413, 57 Am. St. Rep. 847; *Jones v. School Dist.*, 110 Mich. 363, 68 N. W. 222; *Butler v. School Dist.*, 15 Pa. Co. Ct. R. 291.

³⁶ *Cross v. School Directors*, 24 Ill. App. 191; *Shakespear v. Smith*, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327; *Andrews v. School Dist.*, 37 Minn. 96, 33 N. W. 217; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213, 21 N. E. 747.

³⁷ *Andrews v. School Dist.*, 37 Minn. 96, 33 N. W. 217; *Independent Dist. of Flint River v. Kelley*, 55 Iowa, 568, 8 N. W. 426; *Shank-*

OTHER LOCAL QUASI CORPORATIONS.

32. Besides counties, towns, townships, and school districts, there are other local organizations created by statute for purely public purposes, not declared to be corporations, and yet possessing sufficient corporate attributes to be characterized as quasi corporations.

The public quasi corporation, from its very nature, is not susceptible of accurate definition. It is almost a corporation for public purposes. The New England town we have seen to be very nearly a full corporation—the county, township, and school district, in the order mentioned, slightly further removed; and yet all are recognized as distinct entities, entitled to assert their legal rights and incur legal liabilities in corporate capacity and name, cognizable in the courts of the state. Just how near this local agency of government must approximate a municipality—how many corporate characteristics it must have to entitle it to the name of quasi corporation—has been hitherto, and probably will continue to be, left by the courts without exact definition. Just as in the past has been done, so in the future the courts will probably declare such organization a quasi corporation, whenever such declaration is not repugnant to settled law, and is necessary to the attainment of public justice.⁸⁸ Thus have been located in this class of legal bodies drainage districts,⁸⁹ levee dis-

land v. Phillips, 3 Tenn. Ch. 556; McCortle v. Bates, 29 Ohio St. 419, 23 Am. Rep. 758; Eckhardt v. Darby, 118 Mich. 199, 76 N. W. 761.

⁸⁸ 1 Dill. Mun. Corp. (4th Ed.) §§ 9, 25; BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS, 7 Ohio St. 109; ASKEW v. HALE CO., 54 Ala. 639, 25 Am. Rep. 730; Cathcart v. Comstock, 56 Wis. 590, 14 N. W. 833; Hamilton Co. v. Garrett, 62 Tex. 602; Green v. Cape May, 41 N. J. Law, 45.

⁸⁹ Elmore v. Commissioners, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363; Lussem v. Sanitary Dist., 192 Ill. 404, 61 N. E. 544.

tricts,⁴⁰ and road districts;⁴¹ and to it will doubtless be drawn the public organizations for irrigating particular districts of country. Their corporate functions are few, their objects special, and to their transactions will be found applicable the strict rules and principles of decision applied in cases of townships and school districts in limitation of powers and liabilities.

BOARDS—COMMISSIONERS—COMPANIES.

33. A public body of individuals created by law and charged with the performance of some governmental function or functions, whether general or local, constitute a quasi corporation.

In this class of quasi corporations the individuals incorporated, or the members of the body, become the prominent feature, and the locality becomes unimportant or disappears. These agencies of government possess theoretically the following essential attributes of a corporation: (a) A body of individuals; (b) the sanction of the law; (c) the distinct and definite purpose. They are usually called boards, commissions, or trustees, and are charged with the performance of some distinct governmental function, either throughout the entire state or in some particular locality. To this sort of quasi corporations belong overseers of the poor,⁴² river con-

⁴⁰ *Dean v. Davis*, 51 Cal. 406; *People v. Williams*, 56 Cal. 647. A levee district which, under statutory provision, may be established by the county court on application of property owners, may be established by such court notwithstanding objection of less than a majority of the landowners; and it is not a private corporation, but a public, political subdivision of the state. *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629.

⁴¹ *Elliott, Roads & S. p. 325*; *Board of Com'rs of Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298.

⁴² *Overseers of Poor of City of Boston v. Sears*, 22 Pick. (Mass.) 122; *Rouse v. Moore*, 18 Johns. (N. Y.) 407; *Governor v. Gridley, Walk.* (Miss.) 328. See *Town of Cordova v. Village of Le Sueur Center*, 74 Minn. 515, 77 N. W. 290.

servators,⁴³ highway commissioners,⁴⁴ boards of education,⁴⁵ park commissioners,⁴⁶ railroad commissioners,⁴⁷ warehouse commissioners,⁴⁸ boards of public works,⁴⁹ boards of health,⁵⁰ police boards,⁵¹ police juries,⁵² fire engine companies;⁵³ and even a governor of a state has been held to be a quasi corporation sole.⁵⁴

These bodies of public officials are generally only administrative agencies of the state. Their governmental functions are limited in extent and clearly defined by statute, and they have no revenues or taxing powers. They are express public trusts to be administered for the public welfare. The property they may hold, being dedicated to public use and service, is exempt from legal process, like other property of the state; and the measure of their corporate liability is the narrow scope of their corporate functions. But occasionally such bodies are empowered to engage in undertakings of a business character, yielding revenue over which they have qualified control. In such cases the field of liability is enlarged, and they become measurably subject to the same rules as are applied to other corporations performing like services. An instance of this kind occurred in the celebrated cases of the Liverpool dock commission, ultimately decided by the House of Lords, where in this quasi corporation was not only held subject to poor rates,⁵⁵ but liable in damages for negligence in failing to

⁴³ *Conservators of River Tone v. Ash*, 10 Barn. & C. 349.

⁴⁴ *Levy Court v. Coroner*, 2 Wall. (U. S.) 501, 17 L. Ed. 851.

⁴⁵ *State v. Board*, 18 Nev. 173, 1 Pac. 844.

⁴⁶ *Andrews v. People*, 83 Ill. 529; 84 Ill. 28.

⁴⁷ *People v. Harper*, 91 Ill. 357.

⁴⁸ *Id.*

⁴⁹ *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22.

⁵⁰ *State v. Board*, 54 N. J. Law, 325, 23 Atl. 949.

⁵¹ *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

⁵² *Police Jury of Ouachita v. Monroe*, 38 La. Ann. 630.

⁵³ *Cole v. Engine Co.*, 12 R. I. 202.

⁵⁴ *POLK v. PLUMMER*, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; *Governor v. Allen*, 8 Humph. (Tenn.) 176.

⁵⁵ *Jones v. Board*, 11 H. L. Cas. 443.

properly cleanse the Wellington Dock, whereby a vessel was imbedded in harbor mud, and, with its cargo, was badly damaged.⁵⁶ And in another case want of funds was held no defense to such an action, because the commissioners had power to levy a tax, and thereby obtain the necessary funds.⁵⁷ Similar rulings have been made in this country in regard to overseers of highways⁵⁸ and to municipal corporations.⁵⁹

⁵⁶ *MERSEY DOCK TRUSTEES v. GIBBS*, L. R. 1 H. L. 93. This interesting and instructive case is given in full in 1 Thomp. Neg. 581. It is thus digested: "The principle on which a private person or a company is liable for damages occasioned by the neglect of servants applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionally diminished."

⁵⁷ *Hartnall v. Ryde Commissioners*, 4 Best & S. 361.

⁵⁸ *Hover v. Barkhoof*, 44 N. Y. 113.

⁵⁹ *Erie City v. Schwingle*, 22 Pa. 385, 60 Am. Dec. 87; *Hines v. Lockport*, 50 N. Y. 236; *Hyatt v. Rondout*, 44 Barb. (N. Y.) 385; *City of Milledgeville v. Cooley*, 55 Ga. 17.

Part II.

MUNICIPAL CORPORATIONS.

CHAPTER V.

MUNICIPAL CORPORATIONS.

- 34. Municipal Corporations—Distinguishing Elements—Prescription.
- 35. The State.
- 36. The Territories.
- 37. History.

MUNICIPAL CORPORATIONS—DISTINGUISHING ELEMENTS.

34. The municipal corporation is a perfect public corporation, established under and by virtue of a sovereign act of legislation, uniting the people and land within a prescribed boundary into a body corporate and politic for the purposes of local and self-government, and invested with the powers necessary therefor.

It is perfect as contradistinguished from the imperfect quasi corporation, the county, district, or township, loosely organized under general law into a governmental agency for local administration of the state authority within a subdivision of the state,¹ which in strictness cannot be said to be incorporated, though the statutes of many states declare them to be corporations. The municipal corporation is duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town, or district incorporated by

¹ Ante, §§ 7-10; *BOARD OF COM'RS OF HAMILTON CO. v. MIGHELS*, 7 Ohio St. 109; *Talbot County Com'rs v. Queen Anne's Co.*, 50 Md. 245; *Manuel v. Commissioners*, 98 N. C. 9, 3 S. E. 829; *Schultes v. Eberly*, 82 Ala. 242, 2 South. 345; *Cathcart v. Comstock*, 56 Wis. 590, 14 N. W. 833; *Rogers v. People*, 68 Ill. 154; *Beach v. Leahy*, 11 Kan. 23; *Pulaski Co. v. Reeve*, 42 Ark. 54; *State v. Leffingwell*, 54 Mo. 458; *Soper v. Henry Co.*, 26 Iowa, 264; *HILL v. BOSTON*, 122 Mass. 344, 23 Am. Rep. 332.

proper legislation and administration.³ It is lawfully and fully empowered so to do.³ Practically it may fall far short of perfection, but in the eye of the law it is the only ideal of a complete public corporation. Its object is public,⁴ though incidents connected with it may be of private nature,⁵ and so far forth it is subject to the rules of liability controlling private corporations in the ownership of property,⁶ while the quasi public corporation is of a private nature and object, with incidents only that are public.⁷ The municipal is the

³ *Cuddon v. Eastwick*, 1 Salk. 143; *Heller v. Stremmel*, 52 Mo. 309; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *East Tennessee University v. Knoxville*, 6 Baxt. (Tenn.) 166; *State v. Milwaukee*, 20 Wis. 87.

⁴ *Cooley*, Const. Lim. (6th Ed.) p. 138; *STATE v. DENNY*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65, and 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *PEOPLE v. HURLBUT*, supra; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *Taylor v. Carondelet*, 22 Mo. 105; *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670; *State v. Tryon*, 39 Conn. 183; *Mason v. Shawneetown*, 77 Ill. 533; *Starr v. Burlington*, 45 Iowa, 87; *Bearden v. Madison*, 73 Ga. 184; *Milne v. Davidson*, 5 Mart. (N. S.) (La.) 409, 16 Am. Dec. 189.

⁵ *1 Thomp. Priv. Corp.* 22; *Dean v. Davis*, 51 Cal. 406; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *Appeal of Bennett's Branch Imp. Co.*, 65 Pa. 242; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215.

⁶ *BAILEY v. MAYOR*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Jones v. New Haven*, 34 Conn. 1; *Commonwealth v. Philadelphia*, 132 Pa. 288, 19 Atl. 136; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *STATE v. DENNY*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103.

⁷ *Jones v. New Haven*, 34 Conn. 1; *Brumm's Appeal* (Pa.) 12 Atl. 855; *Town of Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Grogan v. San Francisco*, 18 Cal. 590; *Webb v. Mayor*, 64 How. Prac. (N. Y.) 10; *NICHOL v. MAYOR*, 9 Humph. (Tenn.) 252; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *United States v. Railroad Co.*, 17 Wall. (U. S.) 332, 21 L. Ed. 597.

⁸ *Hannibal & St. J. R. Co. v. Marion Co.*, 36 Mo. 294; *Goodnow v. Ramsey Co.*, 11 Minn. 81 (Gil. 12); *Louisville & N. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Granger v. Pulaski Co.*, 26 Ark. 87; *Ray Co. v. Bentley*, 49 Mo. 236; *LARAMIE CO. v. ALBANY CO.*, 92 U. S. 307, 23 L. Ed. 552. But see *Smith v. Myers*, 15 Cal. 33; *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed.

only corporation standing as the representative of the purely public corporation.

It is established under law;⁸ i. e., it may be created by special charter enacted by the general assembly, without popular expression or action from the inhabitants of the territory, as well as by their request or consent;⁹ indeed, municipalities have been incorporated in direct antagonism to the expressed wish of the people.¹⁰ Or it may be voluntarily organized by the residents of a specified territory under general incorporation laws, enacted for such purpose, and author-

77; *CHICAGO, B. & Q. R. CO. v. IOWA*, 94 U. S. 155, 24 L. Ed. 94; *State v. Gas Co.*, 37 Ohio St. 45.

⁸ *Elliott, Mun. Corp.* §§ 12, 13; 1 Dill. *Mun. Corp.* §§ 21, 37, 44, 54; *Clark, Priv. Corp.*, Appendix; *People v. Stout*, 23 Barb. (N. Y.) 349; *PEOPLE v. BUTTE*, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; *STATE v. CURRAN*, 12 Ark. 321; *Taylor v. Newberne*, 55 N. C. 141, 64 Am. Dec. 566; *Smith v. People*, 154 Ill. 58, 39 N. E. 319.

⁹ *Inhabitants of Gorham v. Springfield*, 21 Me. 58; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Blessing v. Galveston*, 42 Tex. 641; *Morford v. Unger*, 8 Iowa (8 Clarke) 82; *Clarke v. Rogers*, 81 Ky. 43; *BERLIN v. GORHAM*, 34 N. H. 206; *People v. Wren*, 5 Ill. 269; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *State ex rel. Dome v. Wilcox*, 45 Mo. 458; *Smith v. McCarthy*, 56 Pa. 359; *Alcorn v. Hamer*, 38 Miss. 652; *State v. Steunenberg*, 5 Idaho, 1, 45 Pac. 462; *In re Narberth Borough*, 16 Pa. Co. Ct. R. 29; *De Hart v. Atlantic City*, 62 N. J. Law, 586, 41 Atl. 687.

¹⁰ *Elliott, Mun. Corp.* § 14. "The erection of such a corporation is in truth simply the creation of a new instrumentality of government." *Elliott, Roads & S.* p. 313; *PEOPLE v. BUTTE*, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; *Inhabitants of Gorham v. Springfield*, 21 Me. 58; *Bristol v. New Chester*, 3 N. H. 524; *STATE v. CURRAN*, 12 Ark. 321; *People v. Wren*, 5 Ill. 269; *Coles v. Madison Co.*, 1 Ill. (Breese) 154, 12 Am. Dec. 161; *Warren v. Mayor*, 2 Gray (Mass.) 84; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *Spring Valley Waterworks v. San Francisco*, 22 Cal. 434; *Zabriskie v. Railroad Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488; *State v. Babcock*, 25 Neb. 709, 41 N. W. 654; *New York Fire Dept. v. Kip*, 10 Wend. (N. Y.) 267; *Proprietors of Land of Southold v. Horton*, 6 Hill (N. Y.) 501; *Morford v. Unger*, 8 Iowa, 82.

izing the erection of a municipality by such means.¹¹ In the first case the charter is the test and measure of the granted powers; in the latter they are to be found in the general corporation statutes. The difference between the two is only in the mode of organization. When fully incorporated, both are equally perfect public corporations.

It is a "sovereign act of legislation," because in this country no other power in the state may create the corporation.¹² The power may not be delegated to any inferior body.¹³ The general assembly or legislature of the state alone possesses

¹¹ *Von Phul v. Hammer*, 29 Iowa, 222; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421; *City of Wyandotte v. Wood*, 5 Kan. 603; *Thomas v. Ashland*, 12 Ohio St. 124; *City of Lafayette v. Jenners*, 10 Ind. 70; *State v. Steunenberg*, 5 Idaho, 1, 45 Pac. 462.

¹² *Chandler v. Douglass*, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732; *United States v. Ins. Co.*, 22 Wall. (U. S.) 99, 22 L. Ed. 816; *Clarke v. Rogers*, 81 Ky. 43; *MILLS v. WILLIAMS*, 33 N. C. 558; *People v. President*, 9 Wend. (N. Y.) 351.

¹³ *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *McCrowell v. Bristol*, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653; *Lauenstein v. Fond du Lac*, 28 Wis. 336; *City of East St. Louis v. Wehrung*, 50 Ill. 28; *Mayor of City of Baltimore v. Scharf*, 54 Md. 499; *Danforth v. Mayor*, 34 N. J. Law, 163; *Ruggles v. Inhabitants of Nantucket*, 11 Cush. (Mass.) 433. Also, see *City of Oakland v. Carpentier*, 13 Cal. 540, and *Matthews v. City of Alexandria*, 68 Mo. 115, 30 Am. Rep. 776, where the cities empowered to build and regulate wharves undertook to confer the right upon lessees or contractors. 1 *Thomp. Priv. Corp.* § 110; *State v. Simons*, 32 Minn. 540, 21 N. W. 750; *In re Incorporation of Village of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; *Territory v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *STATE v. ARMSTRONG*, 3 Sneed (Tenn.) 634. The power to organize or perform ministerial functions under the law authorizing incorporation may be vested in courts or official boards. *EX PARTE CHADWELL*, 3 Baxt. (Tenn.) 98; *Greeneville & P. R. Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332; *Heck v. McEwen*, 12 Lea (Tenn.) 97; *State v. Leatherman*, 38 Ark. 81; *Clark, Priv. Corp.* p. 41, note; *Cooley, Const. Lim.* (6th Ed.) pp. 137, 248.

this inherent creative power.¹⁴ No court or county board or other authority is competent for this legislative function.¹⁵ It is a sovereign act of legislation, in whatever form.

It unites the people and the land, for neither people nor land alone can constitute a municipality. Like a home, it requires a union of both elements—the land to give it body, and men to give it spirit and life. Both are essential to its creation and to its existence.¹⁶ It has a prescribed boundary, because the

¹⁴ Judge Cooley (Cooley, Const. Lim. [6th Ed.] 141) says: "The prevailing doctrine in the courts appears to be that, except in those cases where, by the Constitution, the people have not expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration." "Municipal corporations can only exist under and by virtue of legislative enactment." *City of Guthrie v. Wylie*, 6 Okl. 61, 55 Pac. 103.

See *Hope v. Deaderick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *JAMESON v. PEOPLE*, 16 Ill. 257, 63 Am. Dec. 304; *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *Mayor of City of Mobile v. Moog*, 53 Ala. 561; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *TOWN OF NEW BOSTON v. DUNBARTON*, 12 N. H. 409; *CITY OF MEMPHIS v. WATER CO.*, 5 Helsk. (Tenn.) 529.

¹⁵ *McCULLOCH v. STATE OF MARYLAND*, 4 Wheat. (U. S.) 316, 424, 4 L. Ed. 579; *Mayor of City of Mobile v. Moog*, 53 Ala. 561; *FRANKLIN BRIDGE CO. v. WOOD*, 14 Ga. 80; *City of Norristown v. Shelton*, 1 Head (Tenn.) 24; *Greenville & P. R. Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332; *State v. Jennings*, 27 Ark. 419. But see, also, *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *People v. Carpenter*, 24 N. Y. 86; *Devore's Appeal*, 56 Pa. 163; *Taylor v. Ft. Wayne*, 47 Ind. 274.

¹⁶ *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 180; *Lowber v. Mayor*, 5 Abb. Prac. (N. Y.) 325; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 659; *City of Galesburg v. Hawkinson*, 75 Ill. 152, 156; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Mote*, 48 Neb. 683, 67 N. W. 810; *State v. Fridley Park Village*, 61 Minn. 146, 63 N. W. 613.

limits of the municipality must be fixed and definite, that its territorial jurisdiction may not be uncertain or doubtful.¹⁷

The body is corporate and politic because it is authorized and organized as an agency of the state for public uses and the public good.¹⁸

It is local because,¹⁹ unlike the ancient cities,²⁰ its powers and franchises are to be confined to its territorial limits, or lands immediately contiguous, which are sometimes included for police and sanitary purposes.²¹

¹⁷ *Gilchrist's Appeal*, 109 Pa. 600; *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Cutting v. Stone*, 7 Vt. 471; *Hamilton v. McNeill*, 13 Grat. (Va.) 389; *People v. Carpenter*, 24 N. Y. 86.

¹⁸ *East Tennessee University v. Knoxville*, 6 Baxt. (Tenn.) 166; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 185; *Heller v. Stremmel*, 52 Mo. 309; 1 Dill. Mun. Corp. § 23.

¹⁹ In *People v. Common Council*, 28 Mich. 228, 15 Am. Rep. 202, Cooley, J., said: "While it is a fundamental principle in the state, recognized and perpetuated by express provisions of the Constitution, that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government, the Constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state, from considerations of good policy, as well as those which pertain to the local benefit and local desires." *People v. Morris*, 13 Wend. (N. Y.) 325; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107.

²⁰ Liddell, *Rome*, c. 27. Babylon, Thebes, Athens, Corinth, Carthage, and Rome, though cities, merely, were great ruling powers in the ancient world. The early life of the Christian era was entirely urban. Guizot, *Hist. Civ.*, lect. II.

²¹ *People v. Bennett*, 83 Mich. 457, 47 N. W. 250; *Weed v. Boston*, 126 Mass. 443; *Ogden City v. McLaughlin*, 5 Utah, 387, 16 Pac. 721; *Monroe v. Lawrence*, 44 Kan. 607, 10 L. R. A. 520, 24 Pac. 1113. But see *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. And concerning disposition of sewage beyond corporate limits, see *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. See *East Tennessee University v. Knoxville*, 6 Baxt. (Tenn.) 166; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Dingley v. Boston*, 100 Mass. 544.

It is for self-government, because the idea of foreign domination and exclusion of the people of a city or town from the administration of its internal affairs is repugnant to the fundamental conception of a municipality and the genius of American institutions.²² "Municipium" means a free town, and "municeps" a free citizen thereof, as those ideas were conceived in the Roman Empire. This idea persisted in Italy, Germany, France, and England through the Middle Ages, and despite the Hapsburg, Bourbon, and Stuart tyrannies.²³

A city not governed by its own laws and ordinances in its domestic concerns is not a municipality, either by history or etymology. It must have powers, or it cannot be a government—powers sufficient to authorize it to make its own laws and enforce them.²⁴ It is an imperium in imperio—a favorite in our complex American system of checks and balances and home rule.

In England, notwithstanding the doctrine that a corporation must have the authority of royal assent or act of parliament, municipalities existed without either of these charters. They had existed from time immemorial, and usually their origin is to be found in tradition or romance. Their usages and customs were the only evidence of their franchises, privileges, and powers.

These municipalities were divided into two classes—the one

²² 1 Dillon, *Mun. Corp.* § 8a; Smith, *Mun. Corp.* § 32; *BOARD OF HAMILTON COUNTY COM'RS v. MIGHELS*, 7 Ohio St. 109; *CUDDON v. EASTWICK*, 1 Salk. 143; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *STATE v. DENNY*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

²³ Hallam's *History Middle Ages*, c. 8; 1 Hume's *England*, App. II; Norton *History of London*, c. 20; 1 Stephen's *Eng. Const.* c. 7.

²⁴ *Hopkins v. Mayor of Swansea*, 4 Mees. & W. 621; *State v. Tryon*, 39 Conn. 183; *Mason v. Shawneetown*, 77 Ill. 533; *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670; *Starr v. Burlington*, 45 Iowa, 87; *Taylor v. Carondelet*, 22 Mo. 105; *City of St. Paul v. Colter*, 12 Minn. 41 (Gil. 16) 90 Am. Dec. 278; *Markle v. Akron*, 14 Ohio, 586; *Triggally v. Memphis*, 6 Cold. (Tenn.) 382.

known as "common-law corporations," and the other as "corporations by prescription"; the former existing by immemorial usage,²⁵ and the latter upon a royal charter presumed to have been granted and to have been lost or destroyed.²⁶ These classes of municipal corporations, though common in England, have slight warrant for recognition in America.

Existence by Prescription.

In the New England states it has been frequently ruled that, where no charter or act of incorporation for a town can be found, the corporation may be proved by reputation showing that the town has claimed and exercised corporate functions with the knowledge and acquiescence of the legislature, and without interruption or objection, for a period long enough to afford a title by prescription.²⁷ So in New York with regard to a school district.²⁸ Likewise in the newer states of Indiana,²⁹ Illinois, and Wisconsin,³⁰ the courts have applied the same doctrine to municipal corporations; Illinois judges declaring municipal corporations to be favorites of the law, as created for the public good, and demanded by the wants

²⁵ *Rex v. Mayor, etc., of Stratford on Avon*, 14 East, 348; *Mayor of Hull v. Horner*, Cowp. 104; 1 Dill. Mun. Corp. §§ 32, 37.

²⁶ *Cooley, Const. Lim.* (6th Ed.) p. 236; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *Back v. Carpenter*, 29 Kan. 349.

²⁷ *Inhabitants of Stockbridge v. West Stockbridge*, 12 Mass. 400; *BOW v. ALLENSTOWN*, 34 N. H. 351, 69 Am. Dec. 489; *Trott v. Warren*, 11 Me. 227; *Halfway River School Dist. v. Bradley*, 54 Conn. 74, 5 Atl. 861. In *Dillingham v. Snow*, 5 Mass. 547, reputation was allowed to prevail because a large portion of the records had been destroyed by fire.

See, also, *Town of Londonderry v. Andover*, 28 Vt. 416; *Broking v. Van Valen*, 56 N. J. Law, 85, 27 Atl. 1070.

²⁸ *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319.

²⁹ *Pidgeon v. McCarthy*, 82 Ind. 321, in which case a lot had been taxed by the city government of Vincennes for 60 years without question or objection, and this was held sufficient to show that the lot was within the corporation limits.

³⁰ *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252.

of society.³¹ In all such cases the question to be decided is not one of law, but one of fact, viz.: Has this body claiming to be a corporation maintained an unbroken existence, and claimed to exercise corporate powers so long as to afford presumption of an original grant of corporate powers and franchises? Where this is found, it seems to be the rule of law to assume that the corporation has all the rights, powers, privileges, and franchises conferred by general law upon similar bodies.³² These cases are perhaps sufficient in number to warrant us in saying that there may be in America a municipal corporation other than that created by legislative enactment; but the cases are so few in number where any resort to this old English doctrine is necessary, and the question so unlikely to recur as to warrant passing from them without further notice.

THE STATE.

35. The state is not a municipal corporation.

A consideration of the essential elements of the municipal corporation makes this matter so plain as to seem unnecessary for statement; but, in view of certain judicial expressions and loose statements of authors, the essential difference should be noticed. By the State here is meant a self-existent body of persons united together in one political entity, organized under a distinct government possessing sovereign power recognized and upheld as supreme.³³ It is used generically, and

³¹ JAMESON v. PEOPLE, 16 Ill. 257, 63 Am. Dec. 304.

³² TOWN OF NEW BOSTON v. DUNBARTON, 15 N. H. 201; BOW v. ALLENSTOWN, 34 N. H. 351, 69 Am. Dec. 489; State v. Bunkers, 59 Me. 366; State v. Leatherman, 38 Ark. 81; Cooley, Const. Lim. (6th Ed.) p. 238.

³³ Bouv. Law Dict. subject "State." "A multitude of people united together by a communion of interest, and by common laws, to which they submit with one accord." Burlamaqui, Politic. Law, c. 5; Georgia v. Stanton, 6 Wall. (U. S.) 65, 18 L. Ed. 721; CHISHOLM v. GEORGIA, 2 Dall. (U. S.) 457, 1 L. Ed. 440; Des Moines Co. v.

includes, therefore, not only the states of the federal union, but the government of the United States itself. The State exists by itself and for itself, and without the consent of any one except the people thereof. It is not created or established under an act of legislation, or by the consent of any superior power. In America, at least, it derives its power exclusively from the consent of the people.⁸⁴ This consent is essential, and some lawful expression of it must be given to authorize its creation. If it have not the attribute of sovereignty, it is not a State.⁸⁵ That is the power which creates corporations. It controls and dissolves them. This sovereign power is that which makes it a State, and not a corporation, which is a derivative creation, owing its existence and powers to the State.⁸⁶ It is, of course, not to be denied that in very many of their attributes, functions, and powers, the State and municipal corporation bear close resemblance;⁸⁷ and by one seeking resemblance only they might readily be mistaken for the same kind of political entity. But after tracing all these points of similarity, there still remains the distinguishing and ineradicable difference that one is creator and the other is creature.⁸⁸

Harker, 34 Iowa, 84; **Delafield v. Illinois**, 2 Hill (N. Y.) 159; **TEXAS v. WHITE**, 7 Wall. (U. S.) 700, 19 L. Ed. 227.

⁸⁴ See Declaration of Independence, first and second paragraphs.

⁸⁵ **LUTHER v. BORDEN**, 7 How. (U. S.) 1, 12 L. Ed. 581; **Bank of Augusta v. Earle**, 13 Pet. (U. S.) 519, 10 L. Ed. 274.

But see **State of Indiana v. Woram**, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; **Dikes v. Miller**, 25 Tex. Supp. 281, 78 Am. Dec. 571; **Michigan State Bank v. Hastings**, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; **People v. St. Louis**, 10 Ill. 351, 48 Am. Dec. 339.

⁸⁶ Ante, § 1; **Thomp. Priv. Corp.** §§ 1, 15, 35; **Clark, Priv. Corp.** §§ 4, 13 to 18, inc., Appendix.

⁸⁷ **Delafield v. Illinois**, 2 Hill (N. Y.) 159: "A state is a legal being, capable of transacting some kinds of business like a natural person." **Indiana v. Woram**, 6 Hill (N. Y.) 33, 40 Am. Dec. 378. See **Lowell, Stocks**, § 2, where he says: " * * * The parallel, indeed, between a state and a corporation, is very close."

⁸⁸ **BERLIN v. GORHAM**, 34 N. H. 266; **City of Paterson v. Society**, 24 N. J. Law, 385; **HOPE v. DEADERICK**, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597.

TERRITORIES.**36. A territory is not a municipal corporation.**

A territory of the United States, by its very nature, belongs to a distinct class of political bodies. It is not self-existent.³⁹ The consent of the population is not required to its creation, organization, or political existence. It is created by a sovereign act of legislation,⁴⁰ but its area is too extensive for a municipality. Under congressional grant it may possess the great powers of local legislation, including the creation of corporations, public and private.⁴¹ But the judicial and executive departments are administered by appointees of the federal government, so that the power of local self-government in the territory is partial only.⁴² The territorial powers of legislation usually granted by Congress are entirely subject to the congressional will.⁴³ Congress may at any time abrogate the territorial laws. It may itself enact laws for the territorial government in any or all of its details.⁴⁴ It may grant char-

³⁹ *VINCENNES UNIVERSITY v. INDIANA*, 14 How. (U. S.) 273, 14 L. Ed. 416; *Miners' Bank v. Iowa*, 12 How. 1, 13 L. Ed. 867; *Brittle v. People*, 2 Neb. 198.

⁴⁰ *Williams v. Bank*, 7 Wend. (N. Y.) 539.

⁴¹ *PEOPLE EX REL. v. BUTTE*, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; *Deltz v. Central*, 1 Colo. 323.

⁴² *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134.

⁴³ *Rogers v. Burlington*, 3 Wall. (U. S.) 662, 18 L. Ed. 79; *RIDDICK v. AMELIN*, 1 Mo. 5; *Williams v. Bank*, 7 Wend. (N. Y.) 539.

⁴⁴ In the case of *RIDDICK v. AMELIN*, 1 Mo. 5 (decided in 1821, about the time of the admission of Missouri to statehood), the objection was made that such a Legislature (territorial) was not sovereign, and that nothing short of sovereign power could create a corporation. The answer given was that Congress could give and had given the power to legislate on such subjects. In an act of Congress (Act March 2, 1867, c. 150, § 1, 14 Stat. 426; Rev. St. U. S. § 1889), it was provided that " * * * the legislative assemblies of the several territories of the United States shall not * * * grant private

ters to corporations, private or municipal, and may create new quasi corporations, and divide or consolidate existing ones.⁴⁵ Congress possesses over the territories all the power which the state possesses over public corporations, quasi and municipal, and thereby the territory is given a much closer resemblance than the state to municipal corporations.⁴⁶ The act of Congress under which it is authorized, commonly called the "Organic Act," is its charter of existence; and, like the municipality, the territory may exercise only such powers as are granted by the charter.⁴⁷ But it has none of the common-law qualities of a corporation which inhere in the municipal corporation, and could, at most, be called with semblance of propriety a quasi corporation. It is, however, a peculiarly American political entity of statutory origin, and is as distinctly characterized by its name "territory" as the municipal corporation is by the term "municipality."

Quasi Corporations.

As already shown,⁴⁸ counties, towns, townships, and school districts are not municipal corporations, but only quasi corporations, with limited statutory powers and liabilities, and not subject to the doctrines of the law peculiarly applicable to municipal corporations. This phrase will be used herein in its strict and proper sense, as referring to chartered and organized local governments of towns and cities.

charters or especial privileges. * * * In *Seattle v. Tyler*, Wash. T. 1877, this section was held by Chief Justice Lewis, of that territory, to extend to and embrace municipal corporations within its prohibition.

⁴⁵ 1 Dill. Mun. Corp. (4th Ed.) § 38; *CITY OF GUTHRIE v. TERRITORY*, 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841; *Alger v. Hill*, 2 Wash. St. 344, 27 Pac. 922; *Deitz v. Central*, 1 Colo. 332.

⁴⁶ *RIDDICK v. AMELIN*, 1 Mo. 5; *Williams v. Bank*, 7 Wend. (N. Y.) 539.

⁴⁷ *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *First Nat. Bank v. Yankton*, 101 U. S. 129, 25 L. Ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47.

⁴⁸ Ante, §§ 7, 29.

HISTORY.

37. The American municipal corporation, though differing in many respects from its norm, the English municipality of the eighteenth century, has the same corporate character and attributes, and its law may be studied to advantage in the light of municipal history.

The history of the development of the municipality, which had its origin under Roman rule, in the ancient Italian towns, of its struggles for existence during the storm and stress of the Feudal Ages, of the sturdy resistance of burgher and citizen against the tyranny and exaction of lord and King, of the undying love of home rule among Germanic peoples, and especially of the struggle of these freedom-loving communities in England with the despotism of the house of Stuart, which claimed to rule by divine right, is interesting and instructive; but the limits of this handbook do not permit of extended notice. A thorough exposition of this subject will be found in Hallam's *Middle Ages*,⁴⁹ Hume's *History of England*,⁵⁰ and Green's *History of the English People*.⁵¹

Suffice it here to say that the elements which contribute love of home rule to the municipality are of German origin, and those contributing to its power as an organism come from Rome. Uniting these two elements, we find the essentials of the municipality; its particular form, powers, and life are matters of environment. The town was alike the product and exponent of peaceful industry; it was also the prey of the conquering warrior.⁵² Municipal life had shown signs of considerable activity under the Saxon Kings; but Norman

⁴⁹ Volume 3, c. 8, pt. 1.

⁵⁰ Volume 1, App. 2.

⁵¹ In Harper's edition of the *Short History*, this matter will be found on pages 90-95, 129, 130, 157, 175-178, 190-200, 272, 402, 662-665, 843. See, also, 1 Dill. Mun. Corp. §§ 1-8.

⁵² The larger portion of extraordinary war revenues was obtained by levies upon the cities. The wise lord or monarch preserved the plant, but took the product.

conquest and Norman rule were repressive and stifling. The peaceful citizen was no match for the mailed warrior, and for a long time municipal life was low, unfruitful, and uninviting. The life which had before been seen in the streets of the cities and towns was then attracted to the feudal castle, where were to be found the strong men and beautiful women, the wealth, the display, and the excitement of existence. Still the towns endured, and London never ceased to grow.⁵³ Gradually they began to be recognized as holding the balance of power between contending Kings and nobles, and the want of the one or the other for men and money afforded the towns their opportunity. Under the guilds the tradesmen and artisans had acquired both property and the habit of organization.⁵⁴ These not only commanded respect, but gave them power to demand and obtain recognition and confirmation of their customary rights and privileges. Gradually they grew in importance, until in the thirteenth century Simon de Montfort summoned two citizens from each borough to sit in Parliament.⁵⁵ Before the close of the following century this summons had become regular and habitual, and the cities, boroughs, and leading towns of England were as firmly established as were the shires in their right of parliamentary representation. At first these burghers were the staunch supporters of the King in his efforts to break the power of the great barons; but later, when the royal power under the Tudors and the Stuarts was overshadowing all other forces in the government, the instinct of self-preservation led the towns to side with the yeomen and gentry in their struggle with absolutism, and thereby advanced their interests.⁵⁶ In early times every freeman settling in the borough and

⁵³ 1 Norton, Hist. London, c. 20; Green, Short Hist. Eng. People, c. 6, § 1.

⁵⁴ 3 Adam Smith, Wealth of Nations, c. 3.

⁵⁵ Green, Short Hist. Eng. People, c. 4, § 2.

⁵⁶ Rex v. City of London, Mich., 33, Car. II; Case of City of London, 8 How. St. Tr. 1340.

paying dues to it became thereby a burgher; but in the natural evolution of urban life money became the power, and the merchant guilds gradually grew to become municipal oligarchies.⁵⁷ After a long strife these in turn had been succeeded by the trade companies.⁵⁸ Besides their civic privileges and franchises, the boroughs had acquired civic property; and, consistently with the spirit of the age, the persons then in power in them obtained royal charters, conferring sole municipal power upon the existing burgesses and their successors, thereby excluding all immigrants and newcomers. Many of the towns consequently ceased to grow, and in later years some of them were almost abandoned by people; yet they retained their parliamentary representation, thus forming the famous "rotten borough" of the last century, of which Old Sarum was the type.⁵⁹

The special privileges and favors that a little borough thus had over its most prosperous and growing neighbors became a matter of such reproach that the Reform Parliament of 1832 abolished these pocket boroughs, which had dwindled into petty villages, controlled by neighboring landlords who appointed parliamentary members; and in 1835 the municipal corporation reform act restored to the people of the towns the municipal essence which had been enjoyed by the favored few within their limits for centuries.⁶⁰ The towns, boroughs, and

⁵⁷ Green, *Short Hist. Eng. People*, c. 4, § 4.

⁵⁸ *Ib.*

⁵⁹ 1 Dill, *Mun. Corp.* § 8.

⁶⁰ This act followed the report of a committee of barristers, which on a tour of the kingdom had personally examined into the condition of nearly 250 municipalities. This report showed utter absence of uniformity in municipal government, except that it was uniformly bad. The rights and interests of the people were wholly ignored. Offices were treated, not as public trusts, but as private "grafts." The governing bodies were self-perpetuating, and kept their own incompetent and worthless favorites in the offices, or dismissed them at will to make place for choicer ones. There was no equable, uniform, fiscal policy, or reputable judicial system. Magistrates and constables were ignorant, base, and reckless, and

cities became veritable municipalities, self-government was restored to their people, and then began an era of prosperity among English cities which has continued to the present time.

Juries were appointed from favor, and to render prescribed verdicts. There was no civic conscience, and the corporations were perverted by corruption and oppression to private gain and partisan success.

The report startled the English people, lords, and crown. Under Brougham's lead, parliament declared there was urgent and imperative need of immediate reform; and, addressing its best energies to the subject, formulated and passed the municipal corporations reform act, establishing uniformity in municipal government, restoring the power to the inhabitants, and punishing official misconduct. The barristers' report concluded with the expression of the committee's opinion that the municipal corporations of England and Wales neither possessed nor deserved the respect or confidence of the people. The reform act was so appropriate and thorough in its plan and details that it remains to this day the basis of the municipal system not only of the United Kingdom, but also, by adoption, of the states of the American Union.

CHAPTER VI.

MUNICIPAL CORPORATIONS (Continued). CREATION—HOW— BY WHAT BODIES—SUBJECT TO WHAT RESTRICTIONS, ETC.

38. Creation of Municipal Corporations.
39. What Bodies may Grant Charters.
40. Legislative Discretion.
41. Legislative Power—How Exercised.
42. Compliance with Conditions.
43. Corporations by Implication.
44. Charter not a Contract.
45. Validity—How Tested.

CREATION OF MUNICIPAL CORPORATIONS.

- 38. The creation of municipal corporations within the limits of a state is the appropriate and exclusive function of the legislative power of that state.**

All governmental power of the state in our country inheres in the people of the state.¹ They organize their government by a constitution, wherein they confer all legislative power upon the legislative department. The granting of any right, power, or franchise pertaining to public matters is obviously a function of legislation, and cannot be within the province of the executive or judicial departments.² A municipal corporation requires this grant of governmental authority as the essential condition of its being. Obviously, therefore, this

¹ Cooley, *Const. Lim.* (6th Ed.) pp. 39, 747.

² *HOPE v. DEADERICK*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *CITY OF MEMPHIS v. WATER CO.*, 5 Heisk. (Tenn.) 529; *FRANKLIN BRIDGE CO v. WOOD*, 14 Ga. 80; *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *People v. Assessors*, 1 Hill (N. Y.) 616; *Doboy & Unión Island Tel. Co. v. De Magathias* (C. C.) 25 Fed. 697.

grant of municipal powers to a corporation may and must come from the legislative department.⁵

Power to Create—Delegation of.

Whether this power may be delegated by the legislature to either of the other co-ordinate departments of government, or the chief officers thereof, or any inferior officer or board therein, is a subject of apparent conflict in the decisions of the courts of Iowa⁴ and Colorado,⁵ on the one hand, and of Wisconsin,⁶ Tennessee,⁷ and Arkansas,⁸ on the other. But a reconciliation of these apparently conflicting views may be effected upon the basis of the Tennessee decision, which is to the effect that, if the legislature authorize the formation of

¹ **TOWN OF NEW BOSTON v. DUNBARTON**, 12 N. H. 409. The power to create municipal corporations is legislative, and cannot be delegated to the courts. **Territory v. Stewart**, 1 Wash. St. 98, 23 Pac. 405, 8 L. R. A. 106; *In re Incorporation of Village of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; **CITY OF MEMPHIS v. WATER CO.**, 5 Heisk. (Tenn.) 529; **JAMESON v. PEOPLE**, 18 Ill. 257, 63 Am. Dec. 304; *Tied. Mun. Corp.* § 22. See, also, 1 *Mor. Priv. Corp.* § 15. The legislature has a discretion, uncontrolled by any constitutional limitations, to decide when a given locality has a sufficient number of inhabitants to entitle it to be incorporated as a city. **Mattox v. State**, 115 Ga. 212, 41 S. E. 709.

The power to create a municipal corporation is vested in the legislature, and implies the power to create it with such limitations as that body may see fit to impose, and to impose the same at any stage of its existence. **Redell v. Moores**, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431; See **Cheaney v. Hooser**, 9 B. Mon. (Ky.) 330; **BERLIN v. GORHAM**, 34 N. H. 266; **CITY OF PATERSON v. SOCIETY**, 24 N. J. Law, 385.

⁴ **State v. Weir**, 33 Iowa, 134, 11 Am. Rep. 115.

⁵ **People v. Flemming**, 10 Colo. 553, 16 Pac. 298.

⁶ **State v. Forest County**, 74 Wis. 610, 43 N. W. 551; *In re Incorporation of Village of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638. See, also, **Territory v. Stewart**, 1 Wash. St. 98, 23 Pac. 405, 8 L. R. A. 106.

⁷ **STATE v. ARMSTRONG**, 3 Sneed, 634; *Ex parte Burns*, 1 Tenn. Ch. 83.

⁸ **State v. Leatherman**, 38 Ark. 81; **State v. Jennings**, 27 Ark. 419. See, also, **State v. Simons**, 32 Minn. 540, 21 N. W. 750.

corporations by general law, it may empower courts or boards to do ministerial acts necessary to bring the corporations into being.⁹ It has also been held that the legislature may by special provision in the charter designate persons to issue a certificate of incorporation whenever they shall be satisfied that charter conditions have been complied with.¹⁰ The more recent Pennsylvania cases have also inclined to this view,¹¹ which seems consistent with the Constitution, and the reasonable application of it to the function of making a corporation. It would seem a vain thing to distribute the powers of gov-

⁹ Cooley, Const. Lim. (6th Ed.) p. 146; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *State v. Council*, 106 Iowa, 731, 77 N. W. 474. The power of determining boundaries may be delegated to the courts. *Borough of Glen Ridge v. Stout*, 58 N. J. Law, 598, 33 Atl. 858. See, also, *FRANKLIN BRIDGE CO. v. WOOD*, 14 Ga. 80, 1 Smith's Cas. 65; *Ames v. Booming Co.*, 6 Mich. 266; *Heck v. McEwen*, 12 Lea (Tenn.) 97; *In re New York Elevated R. Co.*, 70 N. Y. 327. See *Thomp. Com. Law Corp.* §§ 643, 646; *In re Alliance Borough*, 19 Pa. Super. Ct. 178; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031.

¹⁰ *STATE v. ARMSTRONG*, 3 Sneed (Tenn.) 634. See reasoning in *EX PARTE CHADWELL*, 3 Baxt. (Tenn.) 83; *Ex parte Burns*, 1 Tenn. Ch. 83; *Greeneville & P. R. Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 333. See, also, *Litchfield Bank v. Church*, 29 Conn. 137; *In re New York Elevated R. Co.*, *supra*; *Napier v. Poe*, 12 Ga. 170.

It has been held that power to grant an exclusive franchise in aid of navigation may be delegated to a village. *Farnum v. Johnson*, 62 Wis. 620, 22 N. W. 751. But power to increase its representation on a county board, when the Constitution ordains that the legislature shall determine such representation, cannot be delegated. *People v. Riordan*, 73 Mich. 508, 41 N. W. 482. See *Angell & A., Corp.* § 31; *Board of Levee Inspectors of Chicot Co. v. Crittenden*, 94 Fed. 613, 36 C. C. A. 418.

¹¹ *Jefferson Co. v. Slagle*, 66 Pa. 202; *Cooper v. Lampeter Tp.*, 8 Watts (Pa.) 125. See, also, *Whitney v. City of New Haven*, 58 Conn. 450, 20 Atl. 666; *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Holland v. State*, 23 Fla. 123, 1 South. 521; *City of Burlington v. Dennison*, 42 N. J. Law, 165; *Kramrath v. City of Albany*, 53 Hun, 206, 6 N. Y. Supp. 54; *Damon v. Inhabitants*, 2 Pick. (Mass.) 345.

ernment among the three co-ordinate departments, and yet allow either to exercise the functions of the other, or permit one to abrogate its powers by conferring them upon another.

WHAT BODIES MAY GRANT CHARTERS.

39. The charters of municipal corporations may be granted by

- (a) The Congress of the United States.
- (b) The state legislatures.
- (c) Territorial legislatures, when authorized by Congress.

By the federal Constitution, Congress is invested with "power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States,"¹² and "to exercise exclusive legislation over such district as may become the seat of the government of the United States."¹³ Under this authority, Congress has erected the District of Columbia into a municipal corporation,¹⁴ has organized territories, and also chartered cities and towns within their boundaries.¹⁵ Under the express grant of powers con-

¹² Const. U. S. art. 4, § 3, par. 2.

¹³ Const. U. S. art. 1, § 8, par. 17.

¹⁴ 16 Stat. 419.

Under the authority granted to Congress to make all laws which shall be necessary and proper for carrying into execution certain specified powers given it, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof, Congress has the power to create a corporation whenever such corporation is a necessary or proper means for carrying into execution any power which is conferred by the Constitution upon the government of the United States. *Luxton v. Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808.

¹⁵ *VINCENNES UNIVERSITY v. INDIANA*, 14 How. (U. S.) 268, 14 L. Ed. 416; *Miners' Bank v. Iowa*, 12 How. (U. S.) 1, 13 L. Ed. 867; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *First Nat. Bank v. Yankton*, 101 U. S. 129, 25 L. Ed. 1046; *Deltz v. Central*, 1 Colo. 323; *PEOPLE v. BUTTE*, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346; *California v. Railroad Co.*, 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150.

tained in the Constitution, and the implied grant of those powers essential to the exercise of the express powers, the authority of Congress to create municipal corporations within the territories of the national government is obvious and beyond question. It has been upheld in several cases,¹⁶ and will probably never again be questioned.

Power Inherent in State Legislature.

The authority of the state legislatures to incorporate cities and towns as useful and indispensable agencies in the efficient administration of government is inherent and undoubted.¹⁷ All legislative power not granted to Congress is reserved to the states. As a necessary consequence, a state legislature may enact any law not forbidden by the state or federal Constitution.¹⁸ The legislatures, therefore, of the several states

¹⁶ *McCULLOCH v. MARYLAND*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *Thomson v. Railroad Co.*, 9 Wall. (U. S.) 579, 19 L. Ed. 792; *California v. Railroad Co.*, 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *CHISHOLM v. GEORGIA*, 2 Dall. (U. S.) 419, 1 L. Ed. 440; *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378, 1 L. Ed. 644; *Osborn v. President*, 9 Wheat. 738, 6 L. Ed. 204.

"In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution or which are contrary to its spirit, so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of state governments, and no more power can be claimed or exercised than is necessary to the attainment of the end." *DRED SCOTT v. SANFORD*, 19 How. (U. S.) 540, 15 L. Ed. 691.

¹⁷ *People v. City of Riverside*, 70 Cal. 461, 11 Pac. 759; *TOWN OF NEW BOSTON v. DUNBARTON*, 12 N. H. 409; *HOPE v. DEADERICK*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431.

¹⁸ *Cooley*, Const. Lim. (6th Ed.) p. 104; *PEOPLE v. DRAPER*, 15 N. Y. 532; *THORPE v. RAILROAD CO.*, 27 Vt. 140, 62 Am. Dec. 625; *Andrews v. State*, 3 Helsk. (Tenn.) 165, 8 Am. Rep. 8; *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442; *Lewis' Appeal*, 67

have exclusive authority to create municipal corporations within the territorial limits of the states, in such manner and under such conditions as they may ordain.¹⁹ Under this exercise of inherent power have been created the municipal corporations of this country, consisting of cities, boroughs, towns, and villages, numbering thousands; and by these municipalities are administered all local municipal affairs of millions of people, involving an annual expenditure therefor of multiplied millions of dollars.

No Inherent Power of Creation in Territories.

The territories possess no inherent or sovereign power.²⁰ Such power as they have has been expressly granted to them

Pa. 153; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *People v. Wright*, 70 Ill. 388; *Mason v. Walt*, 5 Ill. 127; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *People v. Rucker*, 5 Colo. 455; *People v. Osborne*, 7 Colo. 606, 4 Pac. 1074; *Leggett v. Hunter*, 19 N. Y. 445; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; *Sears v. Cottrell*, 5 Mich. 251; *Beauchamp v. State*, 6 Blackf. (Ind.) 290.

¹⁹ 1 Dill. Mun. Corp. § 38.

In *PEOPLE v. DRAPER*, 15 N. Y. 561, Brown, J., said: "When the present Constitution was formed, the entire territory of the state was separated and appropriated by its civil divisions, its counties, cities and towns. These civil divisions are coeval with the government. The state has never existed a moment without them. * * * They are permanent elements in the frame of government. They are institutions of the state, durable and indestructible by any power less than that which gave being to the organic law. They are, however, subject to control and regulation by the legislature."

²⁰ *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *First Nat. Bank v. Yankton*, 101 U. S. 129, 25 L. Ed. 1046; *United States v. Church*, 5 Utah, 361, 15 Pac. 473.

The territorial legislature derives its creative power from Congress. Congress has no inherent power to create corporations, but only such as is granted to it by the federal Constitution, either expressly, or by implication, as necessary to carry into effect express powers. *VINCENNES UNIVERSITY v. INDIANA*, 14 How. (U. S.) 268, 14 L. Ed. 416; *Miners' Bank v. Iowa*, 12 How. (U. S.) 1, 13 L. Ed. 867.

by Congress, and may be withdrawn at any time.²¹ The extent of this power in each territory is dependent upon the terms of the organic act under which it has been established, or upon the general acts of Congress in regard to the territories, and the powers to be exercised by their legislatures. Under an act authorizing the legislative assemblies of the several territories to pass general laws enabling persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, power was claimed for the territorial legislature to incorporate a municipality; but this power was denied as not necessarily implied from the organic act or the general act aforesaid. The power has been implied, however, from a provision in the organic act granting to the territorial legislature power over "all rightful subjects of legislation."²² This general clause has been held sufficient to authorize the legislature to create municipal and other corporations within the territorial limits for the purpose of increasing the efficiency of the territorial government, and supplying the public needs.²³ The power of the territorial legislature has also been challenged upon the ground that this power was expressly granted to Congress, and, being thus delegated to it, cannot be delegated by it to another body. This amounts to a general challenge of any legislative power in a territory, and has been uniformly overruled by the courts.²⁴

²¹ *City of Seattle v. Yesler*, 1 Wash. T. 571.

²² *VINCENNES UNIVERSITY v. INDIANA*, 14 How. (U. S.) 268, 14 L. Ed. 416; *Burnes v. Mayor*, 2 Kan. 454.

See, also, *State v. Young*, 3 Kan. 445; *RIDDICK v. AMELIN*, 1 Mo. 7; *PEOPLE v. BUTTE*, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346.

²³ Under the territorial organic act creating the territory of Colorado, the legislative assembly had power to establish a municipal corporation. *Deitz v. City of Central*, 1 Colo. (1872) 323.

²⁴ *RIDDICK v. AMELIN*, 1 Mo. 5. It was held in this case that Congress could give and had given the power to legislate on such subjects.

LEGISLATIVE DISCRETION.

40. The exercise of the legislative functions of creating municipal corporations is wholly within the discretion of the Legislature, and not subject to the control of the judicial power.

Since the power of creating municipal corporations is vested exclusively in the legislature, and the duty thereof is often enjoined upon that department by constitutional provision,²⁵ the failure, or refusal of the legislature to grant charters to towns, boroughs, or villages desiring them, as well as the enactment of such charters of incorporation for other communities not wishing to be incorporated, have often been the subject of spirited popular discussion, and have occasionally undergone investigation in the courts.²⁶ For example, the former Constitution of the state of New York provided: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages," etc.²⁷ Almost identical provisions exist in the Constitutions of Ohio, Michigan, Wisconsin, California, and other Western states.²⁸

Legislative Discretion Conclusive.

It sometimes happens that persons residing in a village or hamlet are eager, for certain reasons, to have the same incorporated, and they make application by petition to the legislature for that purpose. That body, in the exercise of its undoubted discretion as to what laws it will enact, sometimes refuses to respond favorably to the petition, and thus leaves the community in its unincorporated condition. This is con-

²⁵ 1 Dill. Mun. Corp. § 37.

²⁶ Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; Maloy v. Marietta, 11 Ohio St. 636.

²⁷ Const. 1846, art. 8, § 9.

²⁸ Const. Ohio, 1851, art. 13, § 6; Const. Mich. 1859, art. 12, § 13; Const. Wis. 1848, art. 11, § 3; Const. Cal. 1849, § 37; Const. Or. 1857, art. 11, § 5; Const. Kan. 1859, art. 12, § 5; Const. Nev. 1864, art. 8, § 8; Const. Neb. art. 8, § 4.

clusive upon the inhabitants.²⁹ No power resides in any other department of the government to compel the legislature to enact any law. Having exercised its discretion, the matter is at an end, and no record is found of any case in which the aid of the courts was invoked to compel the legislative assembly to perform the constitutional duty so imposed upon it.³⁰ In other instances, yielding to the solicitations of a few persons, or moved by some other consideration, the legislature has granted charters to incorporate communities against the wish of a great majority of the people.³¹ The legal remedy here is more obvious, and cases have arisen in which process has been obtained to enjoin the organization of a corporation under such charter.³² Occasionally it has happened that for violation of, or lack of conformity to, certain constitutional provisions prescribing the mode or condition of law-making, such charters have been held void by the courts;³³ but no case has been reported in which a court has assumed to enjoin the corporation from assuming and exercising its franchises for the reason that the legislature had acted unwisely or had

²⁹ *City of St. Louis v. Russell*, 9 Mo. 508; *City of St. Louis v. Allen*, 13 Mo. 400; *LARAMIE CO. v. ALBANY CO.*, 92 U. S. 307, 23 L. Ed. 552; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Wallace v. Trustees*, 84 N. C. 164. See, also, *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

³⁰ *Dill. Mun. Corp.* (4th Ed.) § 50. See, also, *City of Galesburg v. Hawkinson*, 75 Ill. 152; *STATE v. ARMSTRONG*, 3 Sneed (Tenn.) 634. But see, also, *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813; *City of Burlington v. Leebrick*, 43 Iowa, 252.

³¹ *Cooley, Const. Lim.* (6th Ed.) pp. 138, 139; *People v. Bennett*, 29 Mich. 451, where it was held that the question of incorporating a village could not be made a judicial one. See, also, *State v. Simons*, 32 Minn. 540, 21 N. W. 750; *Ex parte Burns*, 1 Tenn. Ch. 83; *State v. Armstrong*, 3 Sneed (Tenn.) 634.

³² *City of Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *Town of Woodbury v. Brown*, 101 Tenn. 707, 50 S. W. 743; *Angel v. Spring City* (Tenn. Ch. App.) 53 S. W. 191; *State v. Frost*, 103 Tenn. 685, 54 S. W. 986.

³³ *Town of Woodbury v. Brown*, 101 Tenn. 707, 50 S. W. 743.

abused its discretion in granting the charter of incorporation. In states where there is no constitutional requirement for popular assent to the erection of a municipality, the power of the legislature to create a municipal corporation is absolute, and its discretion in enacting the law has been uniformly held to be not a subject for inquiry or review by the courts.³⁴ The Constitution has invested that department of the government with the discretion to decide for itself and for the people how and when it will exercise this function³⁵ and perform this duty; and the general assembly having, in the exercise of its undoubted constitutional power, decided that a certain village or hamlet ought to be incorporated, and enacted the requisite legislation to that end, all inquiry as to the legislative motive or intention, except as appearing from the act itself, is excluded from judicial consideration.³⁶ If

³⁴ Cooley, *Const. Lim.* pp. 104-5. Speaking of the constitutionality of statutes passed by the legislatures, Judge Cooley says: "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice, or not, in any particular case."

An act creating a municipal corporation takes effect without acceptance by the residents of the incorporated district. *State v. Haines*, 35 Or. 379, 58 Pac. 89.

³⁵ "The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them." Cooley, *Const. Lim.* (6th Ed.) p. 108.

"* * * The frame of the government, the grant of the legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature." Denio, C. J., in *PEOPLE v. DRAPER*, 15 N. Y. 532, 543.

³⁶ *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *Rumsey v. People*, 19 N. Y. 41; *JAMESON v. PEOPLE*, 16 Ill. 257, 63 Am. Dec. 304; *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319; *People v. Maynard*, 15 Mich. 463. And even when attacked on constitutional

the act is constitutionally passed, the corporation is lawfully created, and that is an end of the matter. In some states, however, this power of creating involuntary municipal corporations does not exist in the legislature. This is true of Ohio, Massachusetts, and other states where there are constitutional provisions requiring the popular consent to the act of the legislature before the corporation can come into existence.⁸⁷ Many of the states of the West have embodied similar provisions in their Constitutions, and thus retained for the people of the towns the right of determining whether it is best for them to be incorporated, rather than submit this question to the legislative will.⁸⁸ But where this constitutional provision is not found for the protection of the local communities, the will of the legislature is supreme in the creation, alteration, and termination of municipal corporations.⁸⁹

grounds, such attack cannot be sustained. *Board of Com'rs for Filling Certain Slough Ponds v. Shields*, 62 Mo. 247. If the state acquiesces in the validity of a municipal corporation for a long period, it will be estopped from denying the validity of the incorporation. *State v. Leatherman*, 38 Ark. 81; *People v. Maynard*, 15 Mich. 463.

See, also, *COMMONWEALTH v. PLAISTED*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

⁸⁷ In Missouri the Constitution provides that no municipal corporation shall be created by special act unless the city contains at least 5,000 inhabitants, and in that case the special charter must be approved by a vote of the people. Const. 1865, art. 8, par. 5. The Massachusetts (amendment 2) Constitution provides that the Legislature may charter cities in towns having more than 12,000 inhabitants. Const. Ohio, art. 13, par. 6; Const. Ill. art. 10, par. 6.

⁸⁸ Const. Mo. 1865, art. 8, par. 5.

⁸⁹ *Thomas v. Richmond*, 12 Wall. (U. S.) 356, 20 L. Ed. 453; *Demarest v. New York*, 74 N. Y. 161; *City of Lafayette v. Jenners*, 10 Ind. 70; *State v. Tipton*, 109 Ind. 73, 9 N. E. 704; *City of Paterson v. Society*, 24 N. J. Law, 385; *BERLIN v. GORHAM*, 34 N. H. 266; *State v. Holden*, 19 Neb. 249, 27 N. W. 120; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *City of St. Louis v. Russell*, 9 Mo. 508; *City of St. Louis v. Allen*, 13 Mo. 400.

But in many states where there is no constitutional provision re-

LEGISLATIVE POWER—HOW EXERCISED.

41. The legislature, unless specially directed or limited by the Constitution, may, in its discretion, create corporations

(a) By a special charter;

(b) Under general legislation authorizing the erection and organization of corporations in accordance with the popular will.

The former method was the one in general use in this country during the last century, and, indeed, is quite commonly employed at present. In states even where the Constitution forbids the legislature to grant any special charter of incorporation, it has been ruled that such a constitutional inhibition does not relate to public corporations.⁴⁰ It is therefore not uncommon, when a community desires a charter granting peculiar corporate privileges, or when a legislature thinks that a community should exercise corporate powers of a peculiar character or under special conditions, that a special act called a "charter" is enacted for such community. This is peculiarly true in regard to our great cities, all of which exist under elaborate charters specifying the franchises, privileges, and powers of the corporation, the various departments and officers thereof, the duties and powers of each, and, indeed, all other things supposed to be necessary to the well-being of the corporate community which can be enacted into

quiring that the people of the proposed corporation determine by vote whether they shall be incorporated, it is not unusual for the legislature to submit the question to them, and the right of the legislature to do this does not seem to have been questioned. *Cooley*, *Const. Lim.* (6th Ed.) p. 139.

⁴⁰ A provision that "no corporation shall be created, or its powers increased or diminished, by special law," applies to private corporations only. *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364; *State v. Wilson*, 12 Lea (Tenn.) 246. But see *In re Corporate Powers of City of Council Grove*, 20 Kan. 619; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 633; *Pell v. Newark*, 40 N. J. Law, 71.

general law.⁴¹ This charter is the constitution of the municipality,⁴² which under it may enact by-laws or ordinances not inconsistent with it or with the law of the land. This organic act generally specifies as incorporators the names of a portion of the persons thus incorporated, and of the provisional officers of the municipality to hold the offices and exercise their duties until the time fixed therein for a popular election. In those states wherein by Constitution it is necessary for the people to request or give assent to incorporation, such an act is nugatory until ratified, and the corporation remains in abeyance until such action was taken.⁴³ If never taken, of course, the corporation never comes into existence. But in the great majority of the states no popular request or ratification is provided for by Constitution, and the enactment of the law creates the corporation, and the authorized persons may proceed at once to the exercise of the corporate functions.⁴⁴ The recent Constitutions of many states positively

⁴¹ Nearly all the large American cities exist under special charters. St. Louis is in no county, but was formerly embraced within St. Louis county. The city now levies and collects city and state taxes within its municipal limits, and manages its own affairs free from all outside control except that of the state legislature. Voters of the city have the right to amend the charter at intervals of two years at a general or special election, provided the proposed amendments have been duly sanctioned and submitted to the people by the municipal assembly. See Act Mo. 1841; *City of St. Louis v. Russell*, 9 Mo. 507.

During the early days of San Francisco, there were separate governments for the city and county of San Francisco. In 1856 the two governments were consolidated, and the consolidated government now consists of a mayor, twelve supervisors, and regular city and county officers. As to the dual nature of the government of San Francisco, see *Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620.

⁴² *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 524, 25 L. Ed. 699; 1 Dill. Mun. Corp. § 39; Cooley, Const. Lim. (6th Ed.) p. 227; *Smith, Mun. Corp.* § 60.

⁴³ *State v. Haines*, 35 Or. 379, 58 Pac. 39.

⁴⁴ *PEOPLE v. BUTTE*, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346;

forbid the legislature to create municipal corporations by special legislation.⁴⁵ In these states no discretion is left to the legislature as to the manner in which this important function shall be performed. The only method whereby it can discharge its duty is general legislation.⁴⁶ Usually an act is passed prescribing the conditions upon which communities may become incorporated as cities, boroughs, or villages, and directing the steps to be taken to bring about the incorporation. Ordinarily the provisions of such act are that, whenever the people residing within the boundaries containing a certain number of acres or square miles wish to become incorporated, they shall manifest that desire by public election; and, if a majority of the qualified electors vote in favor of such a step, then the incorporation shall be effected by another election for choosing the necessary officers to manage and control the affairs of the municipality; whereupon the corporation shall become and be invested with certain powers, privileges, rights, and franchises specified and enumerated in the law.⁴⁷ This organization usually takes place under the direction of some court or other existing agency of the state, and the result of the popular action is properly recorded in a county office. The instrument that is recorded is likewise called a "charter," and, like the special charter, generally sets forth and enumerates all the powers, franchises, and privileges of the new corporation.

Constitutional Provision for Vote of Majority of Voters.

In many states it is provided by Constitution that no community shall be erected into a municipal corporation without

PEOPLE v. MORRIS, 13 Wend. (N. Y.) 325; Warren v. Charlestown, 2 Gray (Mass.) 184; STATE v. CURRAN, 7 Eng. (Ark.) 321; BERLIN v. GORHAM, 34 N. H. 266.

⁴⁵ Post, note 49; Smith, Mun. Corp. § 41.

⁴⁶ 1 Dill. Mun. Corp. § 45.

⁴⁷ Alcorn v. Hamer, 38 Miss. 652; Bank of Chenango v. Brown, 26 N. Y. 467; Hobart v. Supervisors, 17 Cal. 23; People v. Salomon, 51 Ill. 37; State v. Noyes, 30 N. H. 279.

the assent of a majority of the qualified voters expressed in a public election held for that purpose. In these states the legislatures usually refuse to take any action whatever until the election has been held and the popular choice expressed; but in some instances, under peculiar provisions, the organic act has first been passed, and the popular assent given to the incorporation afterwards.⁴⁸ If the charter is granted before the election, it contains the provision that it shall not be effective until the people shall have given their assent to the incorporation.

Constitutional Inhibition of Creation by Special Law.

In some states the Constitution provides that no corporations shall be created by special law,⁴⁹ and in these the ques-

⁴⁸ *Call v. Chadbourne*, 46 Me. 206; *CITY OF PATERSON v. SOCIETY*, 24 N. J. Law, 385; *People v. Reynolds*, 10 Ill. 1; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185.

⁴⁹ *City and County of San Francisco v. Waterworks*, 48 Cal. 493; *Oroville & V. R. Co. v. Supervisors*, 37 Cal. 354; *School Dist. No. 56 v. Insurance Co.*, 103 U. S. 707, 26 L. Ed. 601.

The reason for this constitutional inhibition is ably stated by Deady, J., in *Wells, Fargo & Co. v. Railroad Co. (C. C.)* 23 Fed. 469: "Everybody who is at all familiar with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature."

In many states the Constitutions expressly provide that municipal corporations shall not be created other than by general law. Const. Ohio, art. 13, § 6; Const. Ill. art. 10, § 6; Const. Mich. art. 15, § 13; Const. Wis. art. 11, § 3; Const. Ark. art. 12, § 3; Const. N. C. art. 8, § 4; Const. Cal. art. 11, § 6; Const. Mo. art. 9, § 7.

tion has arisen whether this inhibition includes municipal corporations. On this point the decisions are not uniform. The language employed in the various Constitutions is not uniform or identical, though the pivotal question in each case seems to be whether the general term "corporation" includes municipal corporations. In New York, Ohio, Kansas, and Nebraska, the decisions are to the effect that the word "corporation," or phrase "body politic and corporate," includes municipal corporations as well as private.⁵⁰ But in New Jersey, Tennessee, and Rhode Island the holding is to the contrary.⁵¹ In the states last named, and in others where there is no restriction upon the legislative power with respect to corporations, the legislative assemblies are free to choose the method by which municipal corporations shall be established.

Self-Chartered Cities.

In two states of the Union—Missouri⁵² and California⁵³—the legislative power and function in creating municipalities is reduced to its lowest terms by a constitutional provision that cities having more than 100,000 population may frame their charters for themselves, subject to certain restrictions and limitations expressed in the constitutional provision permitting it.⁵⁴ Little else, therefore, remains for the legislature

⁵⁰ *Purdy v. People*, 4 Hill, 384; *State v. Mitchell*, 31 Ohio St. 592; *State v. Pugh*, 43 Ohio St. 98, 1 N. E. 439; *Citizens' Sav. Ass'n v. Topeka*, 3 Dill. 376, Fed. Cas. No. 2,734; *Dundy v. Board*, 8 Neb. 508, 1 N. W. 565. See, generally, *Commercial Nat. Bank v. City of Iola*, 154 U. S. 617, 14 Sup. Ct. 1199, 22 L. Ed. 463; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. Ed. 382; *School Dist. No. 56 v. Insurance Co.*, 103 U. S. 707, 26 L. Ed. 601.

⁵¹ *Pell v. Newark*, 40 N. J. Law, 550; *State v. Narragansett*, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 425.

⁵² Const. art. 9, § 16.

⁵³ Const. art. 11, § 8.

⁵⁴ Under the unique provisions of the Constitutions of these two states, the great cities of St. Louis and San Francisco framed and adopted their own charters in much the same manner as a state ordains its own Constitution, thus affording practical examples of

to do in relation to these cities, than to declare them incorporated, and even this may not be necessary.

COMPLIANCE WITH CONDITIONS.

42. Substantial compliance with the requirements of the general laws for municipal corporations is essential, and is sufficient.

The creation of a legal body invested with functions of government is too important to be passed over lightly. Whatever things, therefore, the legislature has prescribed as prerequisites for the erection of a municipality, which pertains to its essential features and powers, must receive from the people about to enter into it such measure of compliance as evinces deliberate consideration by them before entering upon this important undertaking of local self-government. On the contrary, the interest of the citizens and of the public in an arm of the government is too great to allow little things to imperil its existence. Here applies the maxim, "*De minimis non curat lex.*" The erection of a municipality is not academic, but political; and so the courts apply, in cases challenging the existence of the corporations, those larger rules of life and action which pertain to public affairs, and give substantial justice.

De Facto Corporations.

From these considerations of public policy have arisen and been recognized a class of corporations, public as well as private, known as corporations *de facto*.⁵⁵ Grammatically these bodies might be called quasi corporations, but legally they are wholly unlike that class of corporations. In fact, they are complete organizations; in strict law, they are not corpora-

municipal home rule and self-government without precedent in modern times. Like opportunity is, of course, enjoyed by Kansas City and Los Angeles.

⁵⁵ Smith, *Mun. Corp.* § 64; *Johnson v. Okerstrom*, 70 Minn. 303. 73 N. W. 147.

tions. A corporation de facto is an existing corporation, defective in some essential feature of its organization, whose right to continued existence may be impeached only by the state in a direct proceeding for that purpose.⁵⁶

Essentials of Existence.

The judicial views of this class of corporations are as variant as the social and political conditions of the states where they are entertained. In some of them it is apparently settled that, to constitute a corporation de facto, there must be (1) a valid law authorizing a corporation; (2) an attempt in good faith to organize under it; (3) a colorable compliance with this law; (4) an assumption of corporate powers.⁵⁷ Other states,⁵⁸

⁵⁶ *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558. In most jurisdictions such a proceeding (quo warranto) is expressly authorized by statute. In the absence of statutory provision therefor, it may be maintained at common law. See *Greene v. People*, 150 Ill. 513, 37 N. E. 842; *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298; *State v. Webb*, 97 Ala. 111, 12 South. 377, 38 Am. St. Rep. 151; *People v. Water Co.*, 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172; *Attorney General v. Lorman*, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287; *Holman v. State*, 105 Ind. 569, 5 N. E. 702; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; *People v. De Grauw*, 133 N. Y. 254, 30 N. E. 1006; *Tennessee Automatic Lighting Co. v. Massey* (Tenn. Ch. App.) 56 S. W. 35; *Wyandotte Electric Light Co. v. City of Wyandotte*, 124 Mich. 43, 82 N. W. 821; *Continental Trust Co. v. Railroad Co.* (C. C.) 82 Fed. 642.

⁵⁷ Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation de facto is established. *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362. See, also, *Eaton v. Aspinwall*, 19 N. Y. 119; *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357; *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105; *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Speer v. Board*, 88 Fed. 749, 32 C. C. A. 101; *Donough v. Dewey*, 82 Mich. 309, 46 N. W. 782; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

⁵⁸ *Attorney General v. Town of Dover*, 62 N. J. Law, 138, 41 Atl.

more lenient towards this class of corporations, declare that any statute, even though unconstitutional, is sufficient to authorize the creation of such a corporation; and if there has been an effort in good faith, and in reasonable compliance with its requirements, to organize under it, there is a *de facto* corporation. In the midst of these widely divergent decisions, it is hazardous to attempt to state definitely the essentials of a corporation *de facto* which will be applicable in all the states. The words of Judge Thompson in his Commentaries on Corporations give a clear view of the state of American law on this subject: "Our decisions oscillate between two extreme views: (1) That, where a body of men act as a corporation in the ostensible possession of corporate powers, it will be conclusively presumed in all cases, except in a direct proceeding against them by the state to vacate their franchise, that they are incorporated. (2) That the conditions named in statutes authorizing the organization of corporations are conditions precedent that must be strictly complied with, or the corporation does not exist, and that the want of compliance with any one condition precedent may be shown by any one in a private litigation with a pretended corporation, unless he has estopped himself by his conduct from challenging its corporate existence, and frequently without reference to the question of estoppel."⁹⁹ The sound doctrine of the law, as usual in such cases, is not to be found at either one of these extremes, and ultimately a general consensus of judicial opinion will doubtless establish the law on safe middle ground, consistent with the rule of compliance stated in the preceding paragraph. The judicial temperament among Anglo-Saxon peoples is moderate, conservative, and practical. It recognizes

98; *Taylor v. Skrine*, 3 Brev. (S. C.) 516; *Commonwealth v. McCombs*, 56 Pa. 436; *City of Guthrie v. Wylie*, 6 Okl. 61, 55 Pac. 103; *Cocke v. Halsey*, 16 Pet. (U. S.) 71, 10 L. Ed. 891; *People v. White*, 24 Wend. (N. Y.) 520; *Carleton v. People*, 10 Mich. 250; *Gilkey v. Town of How*, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483.

⁹⁹ 1 Thomp. Corp. § 495.

and respects the old Latin maxim, "In medio tutissimus ibis." The tendency in America is towards uniform system of laws in the various states, and this is even more marked in judicial decisions than in legislation.

CORPORATIONS BY IMPLICATION.

43. A corporation may be created by implication as well as by positive expression of the statute, provided there is a clear manifestation of legislative intention to constitute a corporation, or to invest it with corporate powers and franchises, or to recognize an existing body as having the essential franchises and powers of a corporation.

The usual words employed in a royal charter to constitute a corporation were, "Creamus, erigimus, fundamus, incorporamus"⁶⁰ ("We create, erect, found, incorporate"), though words of similar import and effect were held sufficient at the common law.⁶¹ For instance, a royal charter to the men of Dale to annually elect a mayor, and to plead and be impleaded by the name of mayor and commonalty, was held sufficient to incorporate them.⁶² So a grant by charter to the inhabitants of a town "to be a free borough," without any special word of creation or incorporation, is sufficient.⁶³ And the omission of words "to plead and be impleaded," or to "have a seal," or to make by-laws, would not be fatal;⁶⁴ nor would even the

⁶⁰ 1 Bl. Comm. p. 474.

⁶¹ Id. See, also, *Stebbins v. Jennings*, 10 Pick. (Mass.) 172; *Dean v. Davis*, 51 Cal. 406; *Gaskill v. Dudley*, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; *Jordan v. Cass Co.*, 3 Dill. 185, Fed. Cas. No. 7,517; *Propagation of Gospel Soc. v. Pawlet*, 4 Pet. (U. S.) 480, 7 L. Ed. 927.

⁶² 21 Edw. IV, 56; Dill. Mun. Corp. (4th Ed.) § 42.

⁶³ Dill. Mun. Corp. (4th Ed.) § 42.

⁶⁴ Dill. Mun. Corp. § 42, note 6, citing *Rolle*, Abr. 513; 1 Kyd, Corp. 63; *The Conservators, etc., v. Ash*, 10 Barn. & C. 349 (21 Eng. C. L. 97), 1829. And quoting 1 Kyd, Corp. 63: "It is not necessary that the charter should expressly confer those powers without which a collective body of men cannot be a corporation, such as the power

omission of the name be a fatal defect provided that name could be ascertained or inferred from the terms of the act.⁶⁵ Certain powers and privileges are essential to the existence of a body corporate, such as perpetual succession, right to contract, hold property, and to sue and be sued, etc.; and if the act either expresses these things, or permits them to be fairly implied, the courts will usually sustain the corporation.⁶⁶

"Ut res magis valeat quam pereat."

The rules of the common law in regard to corporations are of general application in this country, and wherever powers and privileges existing only under incorporation are conferred upon a body of persons, or upon the residents or inhabitants of a certain town or district, a corporation will be implied, to the end that the grant may not fail.⁶⁷ It has often been declared to be a question of legislative intent, to be shown either by expression or by implication.⁶⁸

A leading case in Massachusetts will illustrate the judicial inclination to maintain and support wholesome entities, rather than cause a failure of legislative intention. The inhabitants of the several school districts were empowered by statute at a regular meeting to raise money to erect, repair, or purchase a schoolhouse, and do other things necessary to provide a place for the public school—the majority having power to control. After much discussion and many adjournments, the Supreme Court finally settled upon the opinion that, though not expressly incorporated the inhabitants thereof possessed

of suing and being sued, and to take and grant property, though such powers are, in general, expressly given."

⁶⁵ Dill. Mun. Corp. § 42; Trustees of Ministerial & School Fund v. Parks, 10 Me. 441; School Com'rs v. Dean, 2 Stew. & P. (Ala.) 190.

⁶⁶ Grant, Corp. 30; Dill. Mun. Corp. § 42.

⁶⁷ Dill. Mun. Corp. § 43.

⁶⁸ BOW v. ALLENSTOWN, 34 N. H. 351. 69 Am. Dec. 489; INHABITANTS OF FOURTH SCHOOL DIST. v. WOOD, 13 Mass. 193; Mahoney v. Bank, 4 Ark. 620; THOMAS v. DAKIN, 22 Wend. 9, 84.

sufficient corporate powers to maintain an action under a contract to build a schoolhouse, and to make to them a lease of land.⁶⁹ This case carries the doctrine of implied incorporation to its farthest limit; but it will be observed that the corporation here implied and recognized was not a municipal, but merely a quasi corporation, for a most beneficent purpose, but of the very lowest order of corporate life.

CHARTER NOT A CONTRACT.

- 44. Except in those states where the Constitution requires popular assent to the creation of a municipality, it is not necessary that a special charter shall be assented to by the people.**

It is a well-established doctrine with regard to private corporations that the charters thereof are contracts between the state and the corporation or the incorporators, and therefore not subject to alteration or revocation at the will of either party.⁷⁰ They have been adopted by the mutual agreement of both parties, and the agreement of both is essential to their amendment or repeal.⁷¹ But with municipal corporations the rule

⁶⁹ *INHABITANTS OF FOURTH SCHOOL DIST. v. WOOD*, 13 Mass. 193. As bearing upon the same principles, see *Grant, Corp.* 30. Also *Town of North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *THOMAS v. DAKIN*, 22 Wend. (N. Y.) 9; *Stebbins v. Jennings*, 10 Pick. (Mass.) 172; *Mahoney v. Bank*, 4 Ark. 620; *Duncan v. State*, 29 Fla. 439, 10 South. 815; *Society for Propagation of Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 502, 7 L. Ed. 927; *Lewis v. Comanche Co. (C. C.)* 35 Fed. 343; *Lord v. Bigelow*, 8 Vt. 445. In *BOW v. ALLENSTOWN*, 34 N. H. 357, 69 Am. Dec. 489, it was held that the annexation of territory to Allenstown made that town a corporation by implication, even if it were not so before.

⁷⁰ *Elliott, Priv. Corp.* § 96; *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *Downing v. Board*, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; *Zimmer v. State*, 30 Ark. 677.

⁷¹ *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 17 L. Ed. 604.

is different.⁷² Since the municipality is created at the legislative discretion, and for the public welfare, as an instrumentality of government, it is not essential that the inhabitants or residents of the municipal boundaries shall give consent to the charter, as is required in the case of private corporations.⁷³ In the case of special charters, their constitutional enactment by the legislature creates the corporation;⁷⁴ and, in states where the Constitution does not forbid, such corporations may be created whenever and wherever the legislature shall deem best, regardless of the local popular wish.⁷⁵

General Law—Incorporation upon Popular Initiative.

Where the incorporation is under general law, the popular assent is usually, if not invariably, required, as an essential feature of the incorporation, and a condition precedent thereto. In such cases the incorporation is effected upon popular initiative, and so, practically rather than formally, there is an approval of the charter of the municipality.⁷⁶ In other words,

⁷² *EAST HARTFORD v. BRIDGE CO.*, 10 How. (U. S.) 511, 13 L. Ed. 518; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *Smith v. Westcott*, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217; *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Smith, Mun. Corp.* §§ 60, 78.

⁷³ *PEOPLE v. BUTTE*, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *INHABITANTS OF GORHAM v. SPRINGFIELD*, 21 Me. 58; *BERLIN v. GORHAM*, 34 N. H. 266; *Zabriskie v. Railroad Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488; *STATE v. CURRAN*, 12 Ark. 321; *Warren v. Mayor*, 2 Gray (Mass.) 84; *Coles v. Madison Co.*, 1 Ill. 154, 12 Am. Dec. 161; *Morford v. Unger*, 8 Iowa, 82; *Taylor v. Newberne*, 55 N. C. 141, 64 Am. Dec. 566; *State v. Babcock*, 25 Neb. 709, 41 N. W. 654.

⁷⁴ See cases cited in note 73. See *Buford v. State*, 72 Tex. 182, 10 S. W. 401; *In re Millville Borough*, 10 Pa. Co. Ct. R. 321; *SMITH v. CRUTCHER*, 92 Ky. 586, 18 S. W. 521; *People v. Oakland*, 92 Cal. 611, 28 Pac. 807; *MILLS v. WILLIAMS*, 33 N. C. 558.

⁷⁵ See cases cited in notes 73 and 74.

⁷⁶ *Smith, Mun. Corp.* §§ 76, 77.

the state says to its citizens in all its populous subdivisions: "It is permitted to you, but not required of you, to be incorporated as municipalities. Choose you whether you will be so. If you vote to apply the provisions of the general incorporation law to yourselves, then and thereby you will become a municipal corporation." It is to be remembered, however, that, even in those states where general laws for municipal corporations exist, the legislature possesses inherent power, unless forbidden by the state Constitution, to incorporate by special charter; and to this no popular assent is required.

VALIDITY—HOW TESTED.

45. The validity of a municipal corporation is not subject to private or collateral attack, but is subject to impeachment only by the state in a direct proceeding for that purpose.

This rule naturally results from the source and nature of municipal power.⁷⁷ The state has created the municipality as an agency of government. It may terminate that existence at will.⁷⁸ If the inhabitants of a certain boundary within the state limits are exercising municipal functions, that fact

⁷⁷ *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558; *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *State v. Leatherman*, 38 Ark. 81; *Town of Henderson v. Davis*, 106 N. C. 88, 11 S. E. 573; *State v. Carr*, 5 N. H. 367; *Worley v. Harris*, 82 Ind. 493; *Society for Propagation of Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 7 L. Ed. 927; *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319; *Bird v. Perkins*, 33 Mich. 28; *People v. Maynard*, 15 Mich. 463; *Lanning v. Carpenter*, 20 N. Y. 447; *Rumsey v. People*, 10 N. Y. 41; *JAMESON v. PEOPLE*, 16 Ill. 257, 63 Am. Dec. 304; *Swain v. Comstock*, 18 Wis. 463.

⁷⁸ *GIRARD v. PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *Hawkins v. Jonesboro*, 63 Ga. 527; *State v. Flanders*, 24 La. Ann. 57; *LAYTON v. NEW ORLEANS*, 12 La. Ann. 515; *People v. Hill*, 7 Cal. 97; *Sedgwick County Com'rs v. Bailey*, 11 Kan. 631; *Vance v. Little Rock*, 30 Ark. 435; *City and County of San Francisco v. Canavan*, 42 Cal. 541; *United States ex rel. Brown v. Memphis*, 97 U. S. 284, 24 L. Ed. 937.

is, of course, known to the state; and whether that municipality has been erected upon a valid foundation is a matter of public interest, of which the state is the embodied representative. In the case, therefore, of an implied corporation, or a corporation de facto, the municipal character of its existence and right to exist is a subject to be considered and determined by the state for the public, and that, too, by a direct proceeding having that object in view.⁷⁹ Even the state has been held estopped from denying the validity of the incorporation where the municipality has existed and exercised corporate functions for a long time with the consent of the state;⁸⁰ and, whenever the question of the validity of incorporation is raised, there is a strong tendency by the courts, in recognition of the status quo, to uphold the validity and power of the municipality.⁸¹ In other words, the courts, not only in the construction of statutes and contracts, but in the administration of affairs and determination of great public questions, recognize and respect the maxim, "Ut res magis valeat quam pereat."

⁷⁹ Tiedeman Mun. Corp. § 385; SHAPLEIGH v. SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310; Graham v. City of Greenville, 67 Tex. 62, 2 S. W. 742; Chicago, St. L. & N. O. R. Co. v. Kentwood, 49 La. Ann. 931, 22 South. 192.

⁸⁰ City of St. Louis v. Shields, 62 Mo. 247. In State v. Leatherman, 38 Ark. 81, Eakin, J., said: "We are emboldened to declare in behalf of the public good, that the state herself may, by long acquiescence, and by the continued recognition through her officers, state and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law."

See People v. Maynard, 15 Mich. 463; McCulloch v. State, 11 Ind. 424; Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806; JAMESON v. PEOPLE, 16 Ill. 257, 63 Am. Dec. 304; State v. Webb, 110 Ala. 214, 20 South. 462.

⁸¹ People v. Farnham, 35 Ill. 562; JAMESON v. PEOPLE, supra; SMITH v. CRUTCHER, 92 Ky. 586, 18 S. W. 521; State v. Young, 3 Kan. 445; Rains v. Oshkosh, 14 Wis. 372.

CHAPTER VII.

MUNICIPAL CORPORATIONS—ALTERATION AND DISSOLUTION.

- 46. Alteration and Dissolution.
- 47. Territorial Increase.
- 48. Division of Municipal Territory.
- 49. Consolidation.
- 50. Legislative Power—Inherent and Plenary.
- 51. Repeal of Charter and Dissolution.

ALTERATION AND DISSOLUTION.

46. The legislature has plenary powers, unless forbidden by constitutional provision—
- (a) To change the boundaries of municipal corporations so as to enlarge or decrease their territory;
 - (b) To divide a municipal corporation into two or more separate municipalities;
 - (c) To unite two or more separate municipal corporations into a single one;
 - (d) To amend the charter, either by special or general legislation, so as to increase or diminish the municipal powers;
 - (e) To repeal the charter, and thereby dissolve the corporation.

TERRITORIAL INCREASE.

47. In enlarging the boundaries of a municipality, only adjacent or contiguous territory can be attached.

The courts of the country have been inclined to restrict the scope of the legislative power in enlarging corporations so as to observe the unity, territorial as well as legal, of a municipal corporation.¹ They have declared that a municipality

¹ State v. City of Waxahachie, 81 Tex. 626, 17 S. W. 348.

is a single body, and that its territory must be included within a single boundary; that even the legislature is subject to the mathematical verities, and cannot by legislative enactment destroy the standard formula, "One and one make two."² Conceding the power of the legislative department to create municipal corporations, and to alter them according to its own judgment of the public welfare, the courts have held that this right must be exercised in accordance with the facts of nature and the truths of science. Accordingly it has been ruled that noncontiguous territory cannot be annexed.³ In some instances the expression is, "The land annexed must be contiguous or adjacent."⁴ By the former is meant such lands as touch the municipal boundaries, while "adjacent" may include those lying near to and not touching.⁵ It has also been

² *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Vogel v. Little Rock*, 54 Ark. 335, 15 S. W. 836; *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *City of Denver v. Coulenan*, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751; *Chicago & N. W. Ry. Co. v. Oconto*, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

³ *City of Evansville v. Page*, 23 Ind. 525; *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561; *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *Truax v. Pool*, 46 Iowa, 256; *TOWN OF ENTERPRISE v. STATE*, 29 Fla. 128, 10 South. 740; *Woodruff v. Eureka Springs*, 55 Ark. 618, 19 S. W. 29; *South Platte Land Co. v. Buffalo Co.*, 15 Neb. 605, 19 N. W. 711; *McClay v. City of Lincoln*, 32 Neb. 412, 49 N. W. 282; *Town of Cicero v. Chicago*, 182 Ill. 301, 55 N. E. 351; *Clark v. City of Kansas City*, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392; *Miller v. City of Camden* (N. J. Sup.) 44 Atl. 961.

⁴ *State v. Waxahachie*, 81 Tex. 626, 17 S. W. 348; *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Vogel v. Little Rock*, 54 Ark. 335, 15 S. W. 836; *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *City of Evansville v. Page*, 23 Ind. 525; *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561; *Hurla v. Kansas City*, 46 Kan. 738, 27 Pac. 143; *In re Sadler* (Appeal of Brinton) 142 Pa. 511, 21 Atl. 978; *In re Heidler*, 122 Pa. 653, 16 Atl. 97; *City of Emporia v. Smith*, 42 Kan. 433, 22 Pac. 616; *Union Pac. Ry. Co. v. City of Kansas City*, 42 Kan. 497, 22 Pac. 633.

⁵ *Hurla v. Kansas City*, 46 Kan. 738, 27 Pac. 143; *City of Emporia v. Smith*, 42 Kan. 433, 22 Pac. 616; *City of East Dallas v. State*,

held that an unoccupied tract of land cannot be added to the territory of a village merely for the purpose of increasing the tax list and village revenue,⁶ but that when such lands are platted and held for sale for use as town lots, or held and sold as town property, they may be annexed to the corporation.⁷ They may also be annexed when they are needed for any proper municipal purpose, such as sewer, gas, or water,⁸ or to supply residence sites for citizens,⁹ or when they furnish a present abode for a large number of persons, or are valuable for prospective town uses.¹⁰

73 Tex. 371, 11 S. W. 1030; *In re Borough of Alliance*, 7 North Co. R. (Pa.) 396.

⁶ *Village of Hartington v. Luge*, 33 Neb. 623, 50 N. W. 957. In this case the Nebraska Supreme Court decided against the annexation of all lots not subdivided, and the court said that "the principal benefit in this case would be to the village by adding to the taxable property therein, but this of itself is not sufficient." Where 75 or 80 per cent. of the land included in the petition for the incorporation of a town was agricultural and pastoral lands, the incorporation was invalid. *Judd v. State*, 25 Tex. Civ. App. 418, 62 S. W. 543.

⁷ *Strosser v. Ft. Wayne*, 100 Ind. 443; *Taylor v. Ft. Wayne*, 47 Ind. 274; *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Union Pac. Ry. Co. v. Kansas City*, 42 Kan. 497, 22 Pac. 633; *Town of Cicero v. Williamson*, 91 Ind. 541.

General laws authorizing councils of cities and trustees of towns, by resolution, without notice, to annex contiguous territory which has been platted into lots, are constitutional. *Paul v. Walkerton*, 150 Ind. 565, 50 N. E. 725.

⁸ See *Elliott, Mun. Corp.* § 51; *Langley v. City Council*, 118 Ga. 590, 45 S. E. 486.

The general rule is that municipal corporations cannot exercise their powers beyond their own limits, but there are some exceptions; as, for example, to provide for the discharge of sewage. *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

⁹ *Taylor v. Ft. Wayne*, 47 Ind. 274; *Collins v. New Albany*, 59 Ind. 396; *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Tilford v. Olathe*, 44 Kan. 721, 25 Pac. 223; *City of Plattsburg v. Riley*, 42 Mo. App. 18.

¹⁰ *Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13; *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778. But see *Woodruff*

What may be Annexed.

These decisions in regard to the power of annexing territory to an existing corporation have been chiefly made in states where the law permits existing municipal corporations to extend their own territory by action of the corporation, and rarely where the legislature has itself exercised its power for this purpose. The delegation of any legislative power is always of doubtful right; but, when the particular act to be performed is largely ministerial, and not exclusively legislative, the delegation of the power has been often sustained by the courts.¹¹ The authority of the courts to declare that territory not contiguous to an existing municipal corporation cannot be annexed by legislative act is obvious, since it is not possible physically to annex noncontiguous tracts of land. But where the legislature exercises its discretionary power to annex contiguous unsettled and unoccupied territory, farming or pasture lands, or even woodlands, to a municipal corporation, it is not easy to see how the courts can get jurisdiction to revise this legislative discretion, and declare the legislative act to be void.¹² That they should do so, however, in proper cases, where this power of annexation is exercised by the corporation itself under an express or implied delegation of authority therefor, is not in the least strange or presumptuous, since in such cases the courts do not admit that they are revising legislative discretion, but are restraining a manifestly

v. Eureka Springs, 55 Ark. 618, 19 S. W. 15, where the court expresses doubt as to whether annexation could be justified by the city for the sole purpose of using the territory proposed to be annexed for the establishment and maintenance of waterworks upon it. See *Glover v. Terre Haute*, 129 Ind. 593, 29 N. E. 412.

¹¹ *Kelly v. Meeks*, 87 Mo. 396; *Stilz v. Indianapolis*, 55 Ind. 515; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *Hurla v. Kansas City*, 46 Kan. 738, 27 Pac. 143; *Callen v. Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736.

¹² *People v. Bennett*, supra; *City of Galesburg v. Hawkinson*, 75 Ill. 152.

improper exercise or an abuse of legislative power by a subsidiary body using the power for its own benefit.¹³

Illustrations.

Accordingly it has been decided that a city comprising two square miles of territory cannot annex an area of ten square miles, including farms and unoccupied lands;¹⁴ nor can two square miles of territory, containing two settlements of people, separated by unoccupied farming lands not connected by lines of buildings or other improvement, be annexed to a municipal corporation;¹⁵ nor lands occupied by the owner exclusively as a florist and farmer, to which no streets or municipal improvements extend, and which the lines of settlement have not reached.¹⁶ It is no objection to this compulsory annexation of contiguous territory that it will be brought under increased taxation without the consent of the owner, in order to pay not only current expenses of the municipality, but also pre-existing indebtedness. It is presumed that the municipal benefits conferred have been purchased with the funds represented by this indebtedness, and that they will compensate the newly annexed addition for increase of taxation.¹⁷ But this is not a question for the courts. It belongs to the legislature to ascertain and determine when and what territory shall be annexed.¹⁸

¹³ In *Kelly v. Meeks*, 87 Mo. 396, it was held that an act conferring upon a city power to extend its limits was unconstitutional. See, also, *Stilz v. Indianapolis*, 55 Ind. 515; *Taylor v. Ft. Wayne*, 47 Ind. 274; *People v. Carpenter*, 24 N. Y. 86; *Devore's Appeal*, 56 Pa. 163; and cases in note 11.

¹⁴ *State v. Eldson*, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

¹⁵ *In re Borough of Larksville*, 7 Kulp (Pa.) 84.

¹⁶ *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778.

¹⁷ *Lake Erie & W. R. Co. v. Alexandria*, 153 Ind. 521, 55 N. E. 435. An act providing that certain territory annexed to a city shall not receive the benefit of police, fire, and light protection for 10 years is invalid for the reason that all parts of a city are entitled to the same advantages. *Jones v. Memphis*, 101 Tenn. 188, 47 S. W. 138. See *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011.

¹⁸ *GIRARD v. PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed.

Diminution of Territory of Municipality.

The same inherent authority of the legislative assembly by which it enlarges boundaries may also be exercised in diminishing municipal boundaries by excision of a part of the territory.¹⁹ This, too, may be done without consulting the municipality, or that portion of its citizens thus summarily deprived of municipal privileges, unless forbidden by constitutional limitations. In short, this power of increase and diminution of municipal territory is plenary, inherent, and discretionary in the legislature, and, when duly exercised, cannot be revised by the courts.²⁰

53; *Edmunds v. Gookins*, 20 Ind. 477; *Morford v. Unger*, 8 Iowa, 82; *Inhabitants of Gorham v. Inhabitants*, 21 Me. 59; *Wade v. Richmond*, 18 Grat. (Va.) 583; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *City of St. Louis v. Allen*, 13 Mo. 400; *Norris v. Mayor*, 1 Swan (Tenn.) 164; *CHANDLER v. BOSTON*, 112 Mass. 200; *LAYTON v. CITY OF NEW ORLEANS*, 12 La. Ann. 515; *Smith v. McCarthy*, 56 Pa. 359.

In *Lake Erie & W. R. Co. v. Alexandria*, 153 Ind. 521, 55 N. E. 435, an extension of the city limits so as to embrace a tract across which a railroad ran, on which there were standing cars infested with tramps, and the extension was made for the purpose of affording police protection to the portion, was held not unreasonable.

An extension of the limits of a city is not unreasonable when the territory annexed thereby is nearly all improved, and necessary for drainage and police purposes. *City of Kansas City v. Stegmiller*, 151 Mo. 189, 52 S. W. 723; *Parker v. Zeisler*, 73 Mo. App. 537; *Village of Syracuse v. Mapes*, 55 Neb. 738, 76 N. W. 458.

¹⁹ *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699; *GIRARD v. PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *True v. Davis*, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266; *Daly v. Morgan*, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; *Morgan v. Beloit*, 7 Wall. (U. S.) 613, 19 L. Ed. 203; *Thompson v. Abbott*, 61 Mo. 176; *Cooley, Const. Lim.* (6th Ed.) p. 228, and cases cited in note 2. See *City of Indianapolis v. Ritzinger*, 24 Ind. App. 65, 56 N. E. 141; *Christ v. Webster City*, 105 Iowa, 119, 74 N. W. 743, as to discretionary power.

²⁰ *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364. See *Cooley, Const. Lim.* (6th Ed.) p. 228, note 1 and cases therein cited. Also

DIVISION OF MUNICIPAL TERRITORY.

48. The Legislature may likewise, without the consent of the people of a municipality, divide the same into two separate and distinct municipal corporations.

This power has rarely been exercised, since the tendency of urban population is rather to unite than separate into distinct municipalities, and this tendency is usually recognized and respected in legislative bodies. This special power is but a part of that general authority which the legislature possesses over all municipal corporations as agencies of the government. In cases of such division the legislature may apportion the burden of indebtedness between the two, and determine the portion to be borne by each.²¹ It may likewise provide for a

State v. Demann, 83 Minn. 331, 86 N. W. 352; *City of Guthrie v. Wylie*, 6 Okl. 61, 55 Pac. 103.

²¹ *Town of Milwaukee v. Milwaukee*, 12 Wis. 93; *Hurt v. Hamilton*, 25 Kan. 82. In *Bristol v. New Chester*, 3 N. H. 524, *Richardson, C. J.*, said: "The power to divide towns is strictly legislative, and the power to prescribe the rule by which a division of the property of the old town shall be made is incident to the power to divide the territory, and in its nature purely legislative. No general rule can be prescribed by which an equal and just division in such cases can be made. Such a division must be founded upon the circumstances of each particular case." See, further, *Tileston v. Newman*, 23 Vt. 421; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Ottawa County Com'rs v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Richland Co. v. Lawrence Co.*, 12 Ill. 1; *Mills Co. v. Brown*, 85 Tex. 391, 20 S. W. 81; *Morrow Co. v. Hendryx*, 14 Or. 397, 12 Pac. 806; *Board of Sup's of Chickasaw Co. v. Clay Co.*, 62 Miss. 325; *HARTFORD BRIDGE CO. v. EAST HARTFORD*, 16 Conn. 149, 10 How. (U. S.) 511, 13 L. Ed. 518.

Where a municipal corporation is divided, statutory provisions for apportioning the indebtedness of the old and new districts involve questions purely of legislative policy, and, if not in violation of its constitutional right, are in all respects final, and must be followed. *State v. Demann*, 83 Minn. 331, 86 N. W. 352. See *Town of South Portland v. Cape Elizabeth*, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; *Montgomery Co. v. Menefee*, 93 Ky. 33, 18 S. W. 1021; *Sedg-*

division of the property of the old municipality between the two parts thereof.²²

CONSOLIDATION.

49. Likewise it is competent for the legislature, unless forbidden by the Constitution, to unite two or more distinct municipalities having contiguous territory into a single municipal corporation, without the consent of those corporations or the people thereof.

Such consolidation of two separate corporations into a single one is but another illustration of the inherent and plenary power possessed by the legislature to create, control, and dissolve all municipal corporations.²³ Since the legislature by one act might dissolve an existing corporation, and by two succeeding acts charter two other contiguous municipalities comprising the same territory, in the exercise of its conceded powers it may, of course, effect the same result by a single act, without circumlocution.²⁴ It is competent, also, for the legislature, in case of such consolidation, to provide for the disposition of the municipal funds in the several corporate treasuries, or past due at date of consolidation.²⁵ Those items

wick County Com'rs v. Bunker, 16 Kan. 498; Land, Log & Lumber Co. v. Onelda, 83 Wis. 649, 53 N. W. 491.

²² See cases cited in note 21; Town of South Portland v. Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502. In absence of legislative regulation, upon a division each portion will hold in severalty for public purposes the public property which falls within its limits. Prescott v. Lenox, 100 Tenn. 591, 47 S. W. 181.

²³ MT. PLEASANT v. BECKWITH, 100 U. S. 514, 25 L. Ed. 699; Morgan v. Beloit, 7 Wall. (U. S.) 613, 19 L. Ed. 203; GIRARD v. PHILADELPHIA, 7 Wall. (U. S.) 1, 19 L. Ed. 53; True v. Davis, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266; Daly v. Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; Thompson v. Abbott, 61 Mo. 176.

²⁴ Cooley, Const. Lim. (6th Ed.) 228, note.

²⁵ Burlington Sav. Bank v. Clinton (C. C.) 106 Fed. 269; Lake Charles Ice, Light & Waterworks Co. v. Lake Charles City, 106 La. 65, 30 South. 289.

of property belonging to the two old corporations so united, unless otherwise expressly provided, become the property of the new corporation, and the corporate indebtedness of the two former corporations becomes the indebtedness of the consolidation.²⁶ If the legislature shall so choose to enact, one of these corporations may be merged into the other, or both may be consolidated into a new and distinct corporation.²⁷ It is usual to submit this question of consolidation by legislative enactment to a vote of the people of the several corporations thus to be united;²⁸ but, unless the Constitution so requires, it is competent for the legislature to make a consolidation without consulting the wishes of the people.²⁹ The act of consolidation in such cases is said to be an official and peremptory expression of the legislature that such consolidation will promote the public welfare, and from this enactment there is no appeal.³⁰ Until the common council of the consolidated city shall enact a code of ordinances for the government of the new municipality, the ordinances of the two

²⁶ *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *Winters v. George*, 21 Or. 251, 27 Pac. 1041; *Thompson v. Abbott*, 61 Mo. 176; *Smith v. Saginaw*, 81 Mich. 123, 45 N. W. 964; *Stone v. Charlestown*, 114 Mass. 214; *Dousman v. Milwaukee*, 1 Pin. (Wis.) 81; *Watson v. Commissioners*, 82 N. C. 17; *De Mattos v. New Whatcom*, 4 Wash. 127, 20 Pac. 933.

²⁷ *Tied. Mun. Corp.* § 58.

²⁸ See cases cited in note 26.

²⁹ *City of New Orleans v. Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446; *Madry v. Cox*, 73 Tex. 538, 11 S. W. 541; *Smith v. People*, 154 Ill. 58, 39 N. E. 319; *State v. Babcock*, 25 Neb. 709, 41 N. W. 654; *City of Quincy v. O'Brien*, 24 Ill. App. 591; *In re Strand (Cal.)* 21 Pac. 654; *In re Canal St.*, 18 R. I. 129, 25 Atl. 975; *City of Richmond v. Railroad Co.*, 21 Grat. (Va.) 604; *Common Council of City of Muskegon v. Gow*, 94 Mich. 453, 54 N. W. 170; *Commonwealth v. Macferron*, 152 Pa. 244, 25 Atl. 556, 19 L. R. A. 568.

³⁰ *Smith, Mun. Corp.* § 407.

former cities will be and remain in force within the territory of the old cities, respectively.³¹

LEGISLATIVE POWER—INHERENT AND PLENARY.

50. The inherent and plenary power of the legislature over a municipal corporation extends to the amendment of its charter in such manner and to such extent as may seem wise to the legislature.

This is another corollary from the inherent power of the legislature over these agencies of government. The legislature in the first instance decided and declared what powers should be exercised by the municipality, and how it should exercise them. New conditions arising may justly require a curtailing or enlargement of these powers, or a change in the mode of their exercise.³² A new legislature may assemble with new light upon the subject of corporations, and, in its wisdom, may add to or take from the municipal powers of one or of many corporations; and this may be done by general laws or by special laws, when not constitutionally forbidden.³³ An entirely new charter may be enacted for the

³¹ *Camp v. Minneapolis*, 33 Minn. 461, 23 N. W. 845; *Village of North Springfield v. Springfield*, 140 Ill. 165, 29 N. E. 849; *Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13; *Smith v. People*, 154 Ill. 58, 39 N. E. 319.

³² *City of Reading v. Keppleman*, 61 Pa. 233; *Crook v. People*, 106 Ill. 237; *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *Daniel v. Mayor*, 11 Humph. (Tenn.) 582; *GIRARD v. PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *City of Indianapolis v. Gaslight Co.*, 66 Ind. 396; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 169.

³³ *SLOAN v. STATE*, 8 Blackf. (Ind.) 361; *Crook v. People*, 106 Ill. 237; *Churchill v. Walker*, 68 Ga. 681; *Pancoast v. Troth*, 34 N. J. Law, 379; *Wallace v. Trustees*, 84 N. C. 164; *State v. Palmer*, 10 Neb. 203, 4 N. W. 966.

But a general clause repealing all acts contrary to its provisions will not repeal the provisions of the charter, unless the intent of the legislature to effect such repeal is clear. *Fish v. Branin*, 23 N.

new corporation, or specific amendments made to the original.³⁴ Amendments may be made to the general corporation laws, or new general laws may be enacted, which will have the effect of modifying the charter. Any or all of these modes of amendment are open to the legislature, subject, of course, to constitutional limitations.³⁵ If these laws, or any of them, in their operation and effect upon the municipal charter, are challenged in the courts for unconstitutionality, the question is to be tried by the same rules and standards as those arising upon other legislative enactments.³⁶ It is easy to see how a department of the government having power to create and to dissolve a municipality at pleasure should likewise have the power to change or alter its creature while existing under the jurisdiction of its creator. The only limitations upon this power are such as arise from conflict with vested rights, or from express constitutional provisions.³⁷

J. Law, 484; *Cross v. Mayor*, 33 N. J. Law, 57; *Bodine v. Common Council*, 36 N. J. Law, 198; *City of Cumberland v. Magruder*, 34 Md. 381; *People v. Clunle*, 70 Cal. 504, 11 Pac. 775; *City of East St. Louis v. Maxwell*, 99 Ill. 439; *City of Griffin v. Inman*, 57 Ga. 370; *City of Harrisburg v. Sheck*, 104 Pa. 53; *Bond v. Hiestand*, 20 La. Ann. 139; *Tierney v. Dodge*, 9 Minn. 166 (Gil. 153).

³⁴ 1 Smith, Mun. Corp. § 116; Tied. Mun. Corp. §§ 32, 44.

³⁵ *State v. Toledo*, 48 Ohio St. 112, 23 N. E. 1061, 11 L. R. A. 729; *City of Indianapolis v. Gaslight Co.*, 66 Ind. 396; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *Daniel v. Mayor*, 11 Humph. (Tenn.) 582; *Crook v. People*, 106 Ill. 237; *State v. Palmer*, 10 Neb. 203, 4 N. W. 966; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Churchill v. Walker*, 68 Ga. 681.

³⁶ *Bowyer v. City of Camden*, 50 N. J. Law, 87, 11 Atl. 137; *New Bedford & F. S. R. Co. v. Achushnet S. R. Co.*, 143 Mass. 200, 9 N. E. 536; *Board of Socorro County Com'rs v. Leavitt*, 4 N. M. (Glid.) 37, 12 Pac. 759; *Moran v. Long Island City*, 101 N. Y. 439, 5 N. E. 80; *State v. Spaude*, 37 Minn. 322, 34 N. W. 164; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *Smith v. Kernochen*, 7 How. (U. S.) 198, 12 L. Ed. 666; *Powell v. Parkersburg*, 28 W. Va. 698; *King County Com'rs v. Davies*, 1 Wash. St. 290, 24 Pac. 540.

³⁷ In *TOWN OF EAST HARTFORD v. BRIDGE CO.*, 10 How. (U. S.) 534, 13 L. Ed. 528, *Woodbury, J.*, said: “* * * One of the

The decisions upon the exercise of this power are in apparent conflict, but may, perhaps, all be harmonized by recognizing, here as elsewhere, the dual character of the municipality, and the two classes of functions it must perform. In some states this right to amend a municipal charter is limited by a constitutional provision guaranteeing local self-government to the people. This right of the people has been upheld in well-considered decisions in New York,³⁸ Michigan,³⁹ and Indiana.⁴⁰ The general doctrine is as stated by the Supreme Court of Massachusetts:⁴¹ "We cannot declare an act of the legislature invalid because it abridges the privileges of self-government in a particular in regard to which such privilege is not guaranteed by the provisions of the Constitution." And Mr. Justice Field, touching the dissolution of the municipality of Memphis,⁴² said: "There is no contract between the state and the public that the charter of a city shall not at all times be subject to legislative control. There is no such thing as a vested right held by any individuals in the grant of legislative power to a municipality." And the Supreme Court of Maryland has declared that the recognition of a city charter

highest attributes of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently upon other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency. It is bound, also, to continue to regulate such public matters and bodies as much as to organize them at first.

³⁸ *People v. Albertson*, 55 N. Y. 50.

³⁹ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 108; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

⁴⁰ *STATE v. DENNY*, 118 Ind. 382, 449, 21 N. E. 252, 274, 4 L. R. A. 65, 79; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

⁴¹ *COMMONWEALTH v. PLAISTED*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

⁴² *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197.

in the Constitution of the state does not place it beyond legislative control.⁴³ Nor will this power be impaired by the fact that the existing charter had been continued in force by a new Constitution of the state.⁴⁴ And again, in the case of *Girard v. City of Philadelphia*,⁴⁵ the Supreme Court of the United States declared this legislative power not to be affected by the fact that by the terms of its charter the city was made the trustee of a generous charity.⁴⁶ Even the dissolution of a corporation trustee would not affect the trust, since a court of chancery would either assume its execution, or appoint a new trustee.⁴⁷

REPEAL OF CHARTER AND DISSOLUTION.

- 51. The legislature may, at its pleasure, repeal the charter of a municipal corporation, and thereby terminate its existence.**

Here, again, we have another illustration of the sole authority of the legislature in matters of municipal corporations. It can create, regulate, and destroy, and there is no other body or department of government which possesses this power.⁴⁸

⁴³ *MAYOR OF BALTIMORE v. STATE*, 15 Md. 376, 74 Am. Dec. 572.

⁴⁴ *Wiley v. Bluffton*, 111 Ind. 152, 12 N. E. 165.

⁴⁵ 7 Wall. 1, 19 L. Ed. 53.

⁴⁶ The courts have likewise sustained similar devises for municipal charities by McDonogh for the poor of New Orleans and Baltimore (*McDonogh's Ex'rs v. Murdoch*, 15 How. [U. S.] 367, 14 L. Ed. 732); by McMicken for public education in Cincinnati (*Perin v. Carey*, 24 How. [U. S.] 465, 16 L. Ed. 701); and by Mullanphy for immigrants and travelers in St. Louis (*Chambers v. St. Louis*, 29 Mo. 543).

⁴⁷ *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 169; *Smith v. Westcott*, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217; *GIRARD v. PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *LUEHRMAN v. TAXING DIST.*, 2 Lea (Tenn.) 425.

⁴⁸ "All our thoughts and notions of civil government are inseparably associated with cities, counties, and towns. They are permanent elements in the frame of government. They are institu-

The government possesses this power in England, but the King does not.⁴⁹ His prerogative is to create. He cannot destroy. Parliament alone is omnipotent.⁵⁰ In England municipal corporations might also be dissolved by the loss of an integral part thereof,⁵¹ or by the surrender of franchises,⁵² or by a forfeiture of its charter judicially decreed in proceedings by *scire facias* or *quo warranto*.⁵³ These last two methods certainly are not recognized in America.⁵⁴ The legislature having ordained that there shall be a corporation, the citizens thereof cannot nullify that edict by a surrender of the franchise; nor by neglect to exercise the powers and privileges conferred by the charter can they subject the corporation to forfeiture of its franchise.⁵⁵ The loss of an integral part

tions of the state, durable, and indestructible by any power less than that which gave being to the organic law. They are, however, subject to control and regulation by the legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their members, separate them into parts, and annex some of the parts to others." *People v. Draper*, 15 N. Y. 561, per Brown, J.

⁴⁹ 1 Beach, Pub. Corp. § 25; 2 Kent, Comm. 305; Coke, Litt. 176, note; *Rex v. Amory*, 2 Term R. 515. See, also, *EASTMAN v. MEREDITH*, 36 N. H. 284, 72 Am. Dec. 302; *City of St. Louis v. Allen*, 13 Mo. 400.

⁵⁰ *Glover*, Mun. Corp. 24; 1 Dill. Mun. Corp. § 33; 1 Kyd, Corp. 61; Willc. Mun. Corp. 63, 64; Coke, Litt. 176; *Rex v. Amory*, 2 Term R. 515; 2 Kent, Comm. 305; *Regents of University v. Williams*, 9 Gill & J. 365, 409, 31 Am. Dec. 72.

⁵¹ *Rex v. Morris*, 3 East, 215; *Rex v. Stewart*, 4 East, 17; *Rex v. Pasmore*, 3 Term R. 241; *Regina v. Bewdley*, 1 P. Wms. 207; *Banbury Case*, 10 Mod. 346; *Rex v. Tregony*, 8 Mod. 111.

⁵² *Rex v. Osbourne*, 4 East, 326; *Rex v. Miller*, 6 Term R. 268; *Howard's Case*, Hut. 87; *Grant*, Corp. 306.

⁵³ *Rex v. Grosvenor*, 7 Mod. 199; *Smith's Case*, 4 Mod. 55; *Rex v. Saunders*, 3 East, 119; *Rex v. Kent*, 13 East, 220; *Attorney General v. Shrewsbury*, 6 Beav. 220.

⁵⁴ *State v. Waggoner*, 88 Tenn. 293, 12 S. W. 721; *State v. Wilson*, 12 Lea (Tenn.) 246; *LUEHRMAN v. TAXING DIST.*, 2 Lea (Tenn.) 425; *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364.

⁵⁵ *State v. Dunson*, 71 Tex. 65, 9 S. W. 103; *Buford v. State*, 72

of a municipal corporation would practically destroy it, as if the people should all remove from the territory,⁵⁶ or it should be swallowed by an earthquake or volcanic eruption. The corporations of Herculaneum and Pompeii were as effectually destroyed as the cities themselves, and it cannot be doubted that a municipal corporation would be as effectually destroyed by American as by Roman ashes and lava.

Dissolution—Form.

Historically, however, and legally too, the only form of dissolution known to American municipalities is legislative.⁵⁷ The motive, manner, time, or form of the enactment is not material. The legislative motive cannot be questioned judicially.⁵⁸ The age or youth of the corporation will not protect

Tex. 182, 10 S. W. 401; *Morris v. State*, 65 Tex. 53. In the last-named case the court said: "It is extremely doubtful whether a municipal corporation can, by a mere disclaimer, surrender a franchise in which not only the corporation, but a large portion of the population residing within the city's limits, as well as of the commercial world, are interested." In *Hambleton v. Dexter*, 89 Mo. 188, 1 S. W. 234, it was held that franchises granted to municipal corporations cannot be surrendered by them.

⁵⁶ Tied. Mun. Corp. § 38.

⁵⁷ *LUEHRMAN v. TAXING DIST.*, 2 Lea (Tenn.) 425; *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364; *State v. Wilson*, 12 Lea (Tenn.) 246; *State v. Waggoner*, 88 Tenn. 290, 12 S. W. 721. In *People v. Hill*, 7 Cal. 97, the court said: "And as a city may, by legislative enactment, spring from the body of the county, being the first subdivision of the territory and political power of the state, there is no reason in law why it may not be resolved back to its original elements, or why the power that has called this political being into existence may not again destroy it. There is no limitation on the power of the legislature in this respect, and economy and convenience may often require that an act incorporating a city should be repealed, and the inhabitants thereof placed in their original situation." See, also, *State v. Hamilton*, 40 Kan. 323, 19 Pac. 723; *State v. Osborn*, 36 Kan. 530, 13 Pac. 850; *State v. Meadows*, 1 Kan. 90; *Duncombe v. Prindle*, 12 Iowa, 1.

⁵⁸ "Restraints on the legislative power of control must be found

it. The form of the act of repeal is immaterial, if it comply with the constitutional requirement. It may be special or general, as legislative wisdom shall decide. Whenever and however, and from whatever motive or purpose, the legislature shall repeal the charter of a municipal corporation, its life is ended.⁵⁹ The oft-asserted limitations upon this legislative power, the exercise of which may prove drastic and destructive of the interests of individuals and communities unless directed by prudence and caution, are of two kinds: (a) Positive inhibitions expressed in the Constitution;⁶⁰ and (b) property rights vested or protected by constitutional guaranties which would be destroyed or impaired by such legisla-

in the Constitution of the state, or they must rest alone in the legislative discretion." *Cooley, Const. Lim.* (6th Ed.) p. 229.

"Where a corporation is the mere creature of legislative will, established for the general good, and endowed by the state alone, the legislature may, at pleasure, modify the law by which it was created. For in that case there would be but one party affected—the government itself—and therefore not a contract within the meaning of the Constitution. * * *" *Montpelier Academy Trustees v. George*, 14 La. 406, 33 Am. Dec. 585.

If the legislative action in such cases of repeal operates injuriously to the municipalities or to their inhabitants, the remedy is not with the courts. They have no power to interfere. *City of St. Louis v. Allen*, 13 Mo. 400.

⁵⁹ *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *REES v. WATERTOWN*, 19 Wall. (U. S.) 107, 22 L. Ed. 72; *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655, 22 L. Ed. 223; *Amy v. Selma*, 77 Ala. 103; *LUEHRMAN v. TAXING DIST.*, 2 Lea (Tenn.) 425; *CITY OF MEMPHIS v. WATER CO.*, 5 Heisk. (Tenn.) 495; *Lynch v. Lafland*, 4 Cold. (Tenn.) 96. In the case of *Luehrman v. Taxing Dist.*, *supra*, *Cooper, J.* said: "Being created as instrumentalities or arms of the government, they cannot be continued in that capacity whenever the public exigency, of which the legislature alone is judge, demands that they should cease to act." See, also, *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325, 331; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103.

⁶⁰ *Smith, Mun. Corp.* § 116.

tion.⁶¹ A legislative act repealing a municipal charter, when forbidden by the Constitution, would, of course, be void, and would not effect or authorize a dissolution of the corporation; but the interests of the people of the municipality or of its creditors in its quasi private property would not prevent a repeal of the charter, and the consequent dissolution of the corporation. Its estate may then be administered, and its assets equitably applied and distributed.⁶² Usually the means and method of this administration are provided for in the statute which enacts the dissolution of the corporation. The municipal corporation, being dual in its nature, necessarily has powers, privileges, and property of a purely local or private character, not subject to the unlimited legislative power, but exempt therefrom in some states by a provision made for the protection of the community, in others by one made for the protection of creditors whose rights are always and everywhere protected by the contract clause of the federal Constitution, and the decision in the Dartmouth College Case applying and enforcing the same.⁶³ The citizens and creditors of the corporation, having these vested rights in certain property, franchises, and powers of the corporation, may protect and assert them through recognized remedies in the courts of law and equity, state or federal. If creditors have liens upon any of the municipal property, they may pursue their remedy in the courts after dissolution of the municipality as well as before. If the legislature fails to provide for them, the courts of justice are open to afford them remedy and relief. The act of the legislature effects the dissolution of the corporation. The pursuit of these remedies by the citizens

⁶¹ *Morris v. State*, 62 Tex. 728; *Board of Councilmen of City of Frankfort v. Mason*, 100 Ky. 48, 37 S. W. 290.

⁶² *LUEHRMAN v. TAXING DIST.*, 2 Lea (Tenn.) 425; *City of Cincinnati v. Cameron*, 33 Ohio St. 336; *Ellerman v. McManis*, 30 La. Ann. 190, 31 Am. Rep. 218.

⁶³ 1 Dill. Mun. Corp. §§ 66-69.

and creditors is simply the administration of the estate of the deceased.⁶⁴

⁶⁴The measure of this relief is not full or certain on account of the public nature of the corporation, the legislative control, and the sovereignty of the state. *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *PORT OF MOBILE v. WATSON*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Amy v. Selma*, 77 Ala. 108; *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699; *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946.

CHAPTER VIII.

THE CHARTER.

52. Municipal Corporations under General and Special Law.
53. Charter Powers Classified.
54. What Constitutes Municipal Membership.
55. Territorial Limit of Municipal Authority.
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60. Municipal Powers: Expressed—Implied—Inherent.
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MUNICIPAL CORPORATIONS UNDER GENERAL AND SPECIAL LAW.

52. Municipal corporations in the United States, with reference to the mode of their creation, are divisible into two great classes:

- (a) Corporations created by special act of the Legislature;
- (b) Corporations organized under general incorporation statutes.

Every municipal corporation has, or should have, as a warrant for its existence and authority, some official document issued under law by some duly constituted ministerial agent, showing its constitution and the limits of its authority.

This document, which is generally called its charter, when issued under a special act, is usually in the form of a duly certified copy of such special act under the great seal of the state; but, when issued under the authority of general statutes, it may take the form of either a charter, or a court decree, or a certificate showing the fact of incorporation for municipal purposes.

This document may contain a description of the territory, and a full outline of the powers, such as appears in special charters, or it may be merely a certificate of the fact of incorporation of the specified municipality, in which case reference must necessarily be had to the

general statutes for powers and privileges, and to other official documents showing boundaries and other details as essential conditions precedent to the granting of the charter.

A municipal charter, whatever be its form, is a written document constituting the persons residing within a fixed boundary, and their successors, a body corporate and politic for and within such boundary, and prescribing the powers, privileges, and duties of the corporation.

"A municipal charter granted by the crown in England is a written instrument in the form of letters patent, with the great seal appended to it, addressed to all the subjects, and constituting the persons therein named, and their successors, a body corporate for or within the place therein specified, and prescribing the powers and duties of the corporation thereby created."¹ The power to grant this charter has been called the "flower of the prerogative."² And yet a municipality thus created possesses only the common-law powers and qualities of a corporation. Indeed, royal charters were granted only to organized communities having already a recognized municipal existence.³ Where privileges and powers are to be conferred which are not recognized by the common or statute law—where special and unusual powers are to be granted—an act of Parliament is necessary, giving a special charter to the corporation.⁴ Moreover, the royal charter is wholly inoperative until accepted by the persons therein named as incorporators, whereas the parliamentary charter is a public law which all subjects are bound to obey.⁵

Prescription and Implication.

Excepting only municipalities by prescription and at common law, all municipal corporations in England—even those

¹ 1 Dill. Mun. Corp. § 82.

² Wille. Mun. Corp. 25.

³ PEOPLE v. BENNETT, 29 Mich. 451, 18 Am. Rep. 107.

⁴ 1 Kyd, Corp. 61; EASTMAN v. MEREDITH, 36 N. H. 284, 72 Am. Dec. 302.

⁵ Ang. & A. Corp. § 69; CITY OF PATERSON v. SOCIETY, 24 N. J. Law, 385.

called municipal corporations by implication—have their municipal charters. The municipal corporation by implication relies upon a royal charter or act of Parliament for its existence and authority. There is an omission, however, in the act or charter to expressly declare the community a corporation; and so its corporate character must be implied from the charter, and the extent of the powers therein conferred upon it. Municipal corporations by prescription and implication have been held to exist in the United States.⁶

Charter Outlined.

In the American democracy our modern charters are all framed upon the same general model as the parliamentary charters,⁷ but there is great variety in the special powers conferred. An outline of the general features of the modern charter for an American municipality is the following:

(1) The inhabitants of the town or city by its proper name are constituted a body politic and corporate, with right of perpetual succession, and power to use a common seal, sue and be sued, purchase and hold property, etc.

(2) The territorial boundaries are distinctly defined, and the division of the territory into wards.

(3) The governing body of the corporation is ordained, composed of one or two bodies, and usually called aldermen or councilmen.

(4) The qualifications of the voters are prescribed, commonly the same as voters at state elections; but sometimes the voters are required to be property owners residing within the corporate limits, or owners of real estate within the limits residing elsewhere.

⁶ *Trott v. Warren*, 11 Me. 227; *BOW v. ALLENSTOWN*, 34 N. H. 351, 69 Am. Dec. 489; *Inhabitants of Stockbridge v. West Stockbridge*, 12 Mass. 400; *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252; *Austrian v. Guy* (C. C.) 21 Fed. 500; *THOMAS v. DAKIN*, 22 Wend. (N. Y.) 9; *People v. Farnham*, 35 Ill. 562.

⁷ 1 Dill. Mun. Corp. §§ 8, 36, 41.

(5) The officers to be chosen, and the mode of their election.

(6) An enumeration of the powers of the city council, such as to levy and collect taxes, make local improvements, enact local ordinances, punish violations thereof, borrow money, make streets, hold courts, and numerous other appropriate municipal powers.

This charter, resembling the constitution of the state, is the paramount law of the municipality.⁸ To it resort must necessarily be had to determine questions of municipal law and power. But with it must be considered, also, the state statutes and Constitution, and the general jurisprudence of America, and the public policy of the state.⁹

Under familiar rules, as we shall see more fully hereinafter, those provisions of the special charter which are in contravention of the Constitution are, like any other unconstitutional statute, void; but such result does not follow from their conflict with a preceding general statute.¹⁰ A subsequent general statute, however, may operate to repeal charter provisions in conflict with it, as will also, of course, any subsequent constitutional provision, for it is the paramount law of the state, and to it all legislation, previous or subsequent, not granting vested rights, must yield.¹¹

⁸ Bouv. Law Dict. tit. "Charter."

The rule is general, and applicable to the corporate authorities of all municipal bodies, that, where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

⁹ *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33; *Cooley*, Const. Lim. (6th Ed.) pp. 238, 239; *City of Mt. Pleasant v. Breeze*, 11 Iowa, 399; *City of Ft. Scott v. Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437.

¹⁰ *Babcock v. Helena*, 34 Ark. 490; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Gorum v. Mills*, 34 N. J. Law, 177; *CITY OF MOBILE v. DARGAN*, 45 Ala. 310; *City of Leavenworth v. Norton*, 1 Kan. 432.

¹¹ *Daniel v. Mayor*, 11 Humph. (Tenn.) 582; *State v. Mayor*, 24 Ala. 701; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *Wallace v.*

General Welfare Clause.

The enumeration of special powers in a municipal charter is often concluded with a clause conferring general authority to pass all ordinances which may be necessary for the promotion of good order and the general welfare of the municipality, and are not inconsistent with the Constitution and general laws of the state. In some special charters there is no enumeration of the subjects upon which the corporation shall have power to legislate, but only a general grant of power to pass all ordinances which are necessary to the good order and well-being of the corporation.¹² In either case this "general welfare clause" must be construed as conferring no other powers than such as are within the ordinary scope of municipal authority, or which are necessary to accomplish municipal purposes.¹³ The distinction to be observed between the two charters in construing their provisions is considered by Judge Dillon to be essential, "for the powers granted by the general welfare clause, if not stated alone, may be limited, qualified, or, when such intent is manifest, impliedly taken away, by provisions specifying the particular purposes for which by-laws may be made."¹⁴ On the other hand, it would seem that since, under the general welfare clause, the corporation obtains all the usual and necessary powers of the municipality, the specific enumeration of powers might confer others not usual; and thus the charter, containing both specific enumeration and general welfare clauses, might give more powers than one

Trustees, 84 N. C. 164; Wiley v. Bluffton, 111 Ind. 152, 12 N. E. 165; Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 23 Sup. Ct. 234, 47 L. Ed. 249; CITY OF MOBILE v. DARGAN, supra.

¹² 1 Beach, Pub. Corp. §§ 583, 1269; Tied. Mun. Corp. § 135; City of Nashville v. Linck, 12 Lea (Tenn.) 499; City of Brooklyn v. Furey, 9 Misc. Rep. 193, 30 N. Y. Supp. 349.

¹³ Spaulding v. Lowell, 23 Pick. (Mass.) 71; City of New Orleans v. Philippl, 9 La. Ann. 44; City of Leavenworth v. Norton, 1 Kan. 432. But see Cross v. Morristown, 33 N. J. Law, 57.

¹⁴ 1 Dill. Mun. Corp. § 315.

conferring powers only by the general welfare clause. In case of challenge of municipal power, it is probable that the result would depend upon the question whether the court leans towards the doctrine of strict construction, rather than liberal; but the "general welfare clause" would not enlarge an enumerated power expressly limited or restricted, for such construction would make the general clause repeal a special one in the same statute, and thus violate an established rule of interpretation.¹⁵

Powers Conferred.

Under a general grant of authority to pass such by-laws as shall be needful to the good order of the city, power has been upheld to "establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits."¹⁶ The general welfare clause has also been held to confer power to prevent the keeping of bawdy-houses;¹⁷ the feeding of cows on distillery slops, and selling their milk within the city;¹⁸ the public exposure for sale, or sale of merchandise on Sunday;¹⁹ the sale of liquor on Sunday;²⁰ the keeping of saloons, restaurants and other places of public entertainment open after 10 o'clock at night;²¹ the carrying on of the laundry business in a certain portion of the city;²² to forbid all disorderly shouting, dancing, etc., in

¹⁵ *State v. Ferguson*, 33 N. H. 424; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465.

¹⁶ *State v. Merrill*, 37 Me. 329.

¹⁷ *State v. Williams*, 11 S. C. 288.

¹⁸ *Johnson v. Simonton*, 43 Cal. 242.

¹⁹ *City Council of Charleston v. Benjamin*, 2 Strob. (S. C.) 508, 49 Am. Dec. 606.

²⁰ *Megowan v. Commonwealth*, 2 Metc. (Ky.) 3; *State v. Welch*, 36 Conn. 215.

²¹ *State v. Freeman*, 38 N. H. 426; *Morris v. Rome*, 10 Ga. 532; *Village of Platteville v. Bell*, 43 Wis. 488.

²² *In re Hang Kie*, 69 Cal. 149, 10 Pac. 327.

streets and public places;²³ to regulate the keeping and selling of gunpowder within the corporate limits;²⁴ to require elevators inside all stores to be inclosed;²⁵ to prohibit the throwing of heavy or dangerous articles from upper stories of buildings into streets and open spaces near them used as public passways;²⁶ to establish fire limits, and to prevent the erection therein of wooden buildings;²⁷ to prohibit cruelty to animals;²⁸ to prohibit visiting at gambling houses;²⁹ and to fix the time and places of holding public markets for the sale of food, and regulating the same.³⁰

Powers Denied.

But on the contrary, it has been held that the general welfare clause does not authorize a city to aid in constructing a plankroad or tollbridge by a private company beyond the corporate limits;³¹ nor to require the proprietor of a theater, circus, or other licensed place of exhibition to pay a police officer for attendance upon the place;³² nor to subject to a fine "any person whose known character is that of a prostitute";³³ nor to levy taxes upon retailers of ardent spirits;³⁴ nor to require druggists to furnish verified statements quarterly of the kind and quantity of intoxicating liquors sold, and to whom;³⁵

²³ *Town of Washington Com'rs v. Frank*, 46 N. C. 436; *City of St. Charles v. Meyer*, 58 Mo. 86.

²⁴ *Frederick v. Augusta*, 5 Ga. 561.

²⁵ *City of New York v. Williams*, 15 N. Y. 502.

²⁶ *City Council of Charleston v. Elford*, 1 McMul. (S. C.) 234.

²⁷ *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Knoxville Corp. v. Bird*, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

²⁸ *City of St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791.

²⁹ *Ex parte Lane*, 76 Cal. 587, 18 Pac. 677.

³⁰ *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260; *Ketchum v. Buffalo*, 14 N. Y. 356.

³¹ *City Council of Montgomery v. Plank Road Co.*, 31 Ala. 76.

³² *Waters v. Leech*, 3 Ark. 110.

³³ *Buell v. State*, 45 Ark. 336.

³⁴ *Ex parte Burnett*, 30 Ala. 461; *Town of Asheville Com'rs v. Means*, 29 N. C. 406.

³⁵ *City of Clinton v. Phillips*, 58 Ill. 102, 11 Am. Rep. 52.

nor to exact a license fee from peddlers in the discretion of the mayor;³⁶ nor to require cotton merchants to keep a record of their purchases of loose cotton;³⁷ nor to prohibit street processions, with musical instruments, banners, torches, singing, and shouting;³⁸ nor to require a license tax for a temporary stand for the sale of lemonade, cake, etc.;³⁹ nor to prescribe a different mode of trial and punishment, in addition to that provided by the state law, for enticing and harboring seamen;⁴⁰ nor to regulate and license the sale of liquors, in addition to the state regulation and license;⁴¹ nor to prohibit the retail of liquors by one duly licensed by the state,⁴² nor to forbid it during any divine service held within the corporate limits.⁴³ These cases are sufficient to show the general current of judicial opinion in the United States to sustain, under the general welfare clause of the charter, all ordinances tending to promote the general welfare and preserve the peace and good order of society, and protect persons, health, and property of citizens, unless they contravene some constitutional provision.

CHARTER POWERS CLASSIFIED.

53. The powers, functions, and duties of a municipal corporation are divisible into two great classes:

(a) GOVERNMENTAL: That is, those which are conferred and imposed upon a municipal corporation, as a local agency of limited and prescribed jurisdiction, to be exercised by it in administering the powers of the state, and promoting the public welfare within it;

³⁶ *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652.

³⁷ *Long v. Taxing Dist.*, 7 Lea (Tenn.) 134, 40 Am. Rep. 55.

³⁸ *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

³⁹ *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.

⁴⁰ *City of Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452.

⁴¹ *Commonwealth v. Dow*, 10 Metc. (Mass.) 382; *Loeb v. Attica*, 82 Ind. 175, 42 Am. Rep. 494.

⁴² *Ex parte Burnett*, 30 Ala. 461.

⁴³ *Gilham v. Wells*, 64 Ga. 192.

- (b) **MUNICIPAL:** Those conferred and imposed for the special benefit and advantage of the urban community which is incorporated into a distinct corporate person or municipality.

Governmental functions have also been defined and described by judges and authors so as to include all those which are legislative, judicial, discretionary, public, and political, while municipal powers and duties are held to include all those which are ministerial, mandatory, peremptory, private, and corporate.⁴⁴ Under the head of "governmental powers" are accordingly classified (a) powers pertaining to the administration of justice; (b) all police powers; (c) power of eminent domain; (d) powers for the promotion of public education; (e) powers to maintain a fire department and extinguish fires; (f) all other charter powers to be exercised by the municipality, as an agency of the state, for the benefit of the public, in or for the exercise of which the corporation receives no consideration.⁴⁵ All other charter powers and duties, including not only those which are mandatory, such as the proper care of streets and alleys, but also those powers which are discretionary, such as the erection and maintenance of waterworks, gasworks, and electric plants, from which profit may be derived by the municipality, are municipal.⁴⁶

Legislative Control of Governmental Powers—None over Municipal.

In the exercise of its governmental powers and functions the municipality represents the state; and the officers executing these powers are rather officers of the state than of the municipality, and, as such, they are peculiarly subject to the

⁴⁴ Tied. Mun. Corp. §§ 110-112.

⁴⁵ Stedman v. San Francisco, 63 Cal. 193; Jones v. Richmond, 18 Grat. (Va.) 517, 98 Am. Dec. 695.

⁴⁶ MERSEY DOCK CASES, 11 H. L. Cas. 687; City of Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Murphy v. Lowell, 124 Mass. 564; Grimes v. Keene, 52 N. H. 335; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434.

control of the state, while those officers who perform strictly municipal functions are municipal officers to be chosen by the corporation, and are not so subject to legislative control.⁴⁷ It has accordingly been held that the legislature may create and appoint boards of fire and police commissioners, and vest them with power of selecting and appointing the police force;⁴⁸ and so, also, of park commissioners;⁴⁹ though it may have no power to appoint mayors or councilmen or street commissioners, whose duties are strictly municipal.⁵⁰ The judicial views of these distinct functions of a municipality are not uniform, but in some instances quite conflicting and discordant, as illustrated by the able opinions of Judges Campbell and Cooley in two leading cases in Michigan⁵¹ emphasizing these distinctions, and by the masterly opinion of Chief Justice Denio in a celebrated New York case⁵² denying the existence of these distinctions, and asserting that all municipal powers and functions are public. The importance of the question

⁴⁷ *United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *State v. Hine*, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83; *State v. O'Connor*, 54 N. J. Law, 36, 22 Atl. 1091; *People v. McKinney*, 52 N. Y. 374; *In re Richmond Mayoralty*, 19 Grat. (Va.) 673; *STATE v. DENNY*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *State v. George*, 23 Fla. 585, 3 South. 81; *Stanfield v. State*, 83 Tex. 317, 18 S. W. 577; *State v. Nine Justices*, 90 Tenn. 722, 18 S. W. 393; *Green v. Fresno*, 95 Cal. 329, 30 Pac. 544.

⁴⁸ *COMMONWEALTH v. PLAISTED*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; *People v. McDonald*, 69 N. Y. 362; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177.

Contra, *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *STATE v. DENNY*, 118 Ind. 382, 449, 21 N. E. 252, 274, 4 L. R. A. 79, 85.

⁴⁹ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103.

⁵⁰ *Richmond Mayoralty Case*, 19 Grat. (Va.) 673; *State v. Bogard*, 128 Ind. 480, 27 N. E. 1113; *Hathaway v. New Baltimore*, 48 Mich. 251, 12 N. W. 186; *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508.

⁵¹ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

⁵² *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 248.

arises out of the fact that upon its solution depend the power of legislative control, and also civil liabilities of corporations, under which head it will receive consideration hereinafter.⁵³ Suffice it here to say that the general trend of judicial opinion is unmistakably toward the double aspect of the municipality, and the recognition of the quasi private nature of the powers, offices, and property pertaining to it for the special benefit and peculiar advantage of its citizens and of the locality.

WHAT CONSTITUTES MUNICIPAL MEMBERSHIP.

54. The persons residing within the corporate limits are members of the municipal corporation.

This is wholly unlike the rule and practice in private corporations. Membership in a private corporation is always voluntary, and in a stock corporation is evidenced by the holding of a certificate of a share or shares of the capital stock.⁵⁴ In a municipal corporation it is otherwise. Every person residing within the municipal boundaries, whether he will or not, is a member of the corporation, subject to its lawful authority, and entitled to the privileges and immunities of membership, as well as liable to the burdens and liabilities thereof.⁵⁵ And persons who come within the corporate limits, though they are only passing through the city, are, so long as they remain within its boundaries, subject to all its police regulations, and bound to take notice of and obey the same.⁵⁶

⁵³ 1 Dill. Mun. Corp. §§ 26, 27.

⁵⁴ *State v. Ferris*, 42 Conn. 560; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801.

⁵⁵ *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465; *Oakes v. Hill*, 10 Pick. (Mass.) 333.

⁵⁶ *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670; *City of Knoxville v. King*, 7 Lea (Tenn.) 441; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47; *Strauss v. Pontiac*, 40 Ill. 301; *Village of Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Village of St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756.

By the common law the members of the municipal corporation were those only to whom the King chose to issue his letters patent (and their successors), usually a portion of the citizens. Nonresidents, however, were often members. The integral parts of the corporation were the mayor, the aldermen, and the commonalty; and the presence of all these integral parts was essential to the validity of corporate action.⁵⁷

The spirit of modern democracy has overcome all these exclusive practices and aristocratic ideas, in England as well as in America, and the inhabitants of the corporations are now the source of power, and the officers are their servants.

TERRITORIAL LIMIT OF MUNICIPAL AUTHORITY.

55. The municipal authority is coextensive with the municipal boundaries, and generally is limited by them.

Since the municipal corporation is an agency of the state for local government, the by-laws and ordinances of the corporation must, of course, prevail over the entire territory which is incorporated, and all persons within those boundaries to whom they are applicable. They are local laws, therefore, enacted or authorized by the state, and all persons within the municipal jurisdiction are bound to respect and obey them.⁵⁸

Exceptions.

The exceptions to the rule that the corporate limits are the boundary of corporate authority are few and special. They will be found generally in legislative acts giving jurisdiction to city boards of health over some district beyond the municipi-

⁵⁷ 1 Dill. Mun. Corp. § 35.

⁵⁸ Dodge v. Gridley, 10 Ohio, 173; City of Knoxville v. King, 7 Lea (Tenn.) 441; Johnson v. Simonton, 43 Cal. 242; Swift v. Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; Plymouth Com'rs v. Pettijohn, 15 N. C. 591; City of Buffalo v. Schleifer, 2 Misc. Rep. 216, 21 N. Y. Supp. 913; Citizens' Gas & Mining Co. v. Elwood, 114 Ind. 332, 16 N. E. 624; Perdue v. Ellis, 18 Ga. 586; State v. Merrill, 37 Me. 329.

pal boundaries, to the end that they may be enabled thus to protect the public health of the municipality. Some acts give jurisdiction of territory outside its municipal boundaries from which it obtains its water supply;⁵⁹ and likewise to prevent nuisances in adjacent territory lying beyond the city limits.⁶⁰ This last power was maintained by the Supreme Court of Illinois to the extent of authorizing the city of Chicago to enforce an ordinance forbidding any person or corporation to carry on the business of slaughtering, rendering, etc., within a mile of the city limits, and thereby to abate, as a nuisance, the factory of the Chicago Packing Company, which was outside the city limits, and within the incorporated town of Lake, from which it held a license to carry on its business.⁶¹ A city has also been held to possess implied power to make a contract with an adjoining landowner to give an outlet to its sewage beyond the city limits, and to control the necessary sewer system beyond its limits.⁶²

ACCEPTANCE OF CHARTER BY CITIZENS UNNECESSARY.

56. Acceptance of a municipal charter by the citizens of the municipality is not necessary to its validity, unless required by constitutional provisions.

Recurring to the distinction between private and public corporations, it is essential to bear in mind that the charter of a municipal corporation is not a contract between the state and the corporation or incorporators;⁶³ but it is an act of legislation by the state in the exercise of its sovereign power, and

⁵⁹ *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354.

⁶⁰ *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275. See, also, *Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

⁶¹ *CHICAGO PACKING & PROVISION CO. v. CHICAGO*, 88 Ill. 221, 30 Am. Rep. 545.

⁶² *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

⁶³ *EAST HARTFORD v. BRIDGE CO.*, 10 How. (U. S.) 511, 13 L. Ed. 518; *City of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

needs not the consent of any of its citizens to give it validity, however ineffectual the charter might be if the citizens should refuse to recognize it or to organize a corporation thereunder.⁶⁴ Such refusal, if unanimously persisted in by the inhabitants, might result in making the statute a dead letter; but the act of even a small minority in organizing the corporation and setting the municipal machinery in motion would revive the statute, inspire the dormant charter, and erect the municipality into a valid, existing corporation.⁶⁵ It would then become, as was intended, an active agent and instrumentality of the government, with the right to compel respect and obedience from the dissenting majority of members, however preponderant they might be in numbers or influence.⁶⁶

Grant Conditional upon Acceptance.

Yet it is competent for the legislature to make the grant of charter powers conditional upon their acceptance by a majority of the inhabitants. A clause requiring that, before the charter shall go into operation, the people of the proposed municipality shall, by public election or otherwise, give assent to its provisions by formal acceptance of the same, is not ground for impeaching the act as an unwarranted delegation of legislative power.⁶⁷ Such a clause has been repeatedly de-

⁶⁴ *Foot v. Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737; *People v. Oakland*, 92 Cal. 611, 28 Pac. 807; *Buford v. State*, 72 Tex. 182, 10 S. W. 401; *People v. Stout*, 23 Barb. (N. Y.) 340; *State v. Babcock*, 25 Neb. 709, 41 N. W. 654; *MILLS v. WILLIAMS*, 33 N. C. 558; *STATE v. CURRAN*, 12 Ark. 321; *State v. Haines*, 35 Or. 379, 58 Pac. 39.

⁶⁵ *CITY OF PATERSON v. SOCIETY*, 24 N. J. Law, 385; *Muscantine Turn Verein v. Funck*, 18 Iowa, 469; *Inhabitants of Gorham v. Springfield*, 21 Me. 58; *PEOPLE v. BUTTE*, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

See, contra, *Lea v. Hernandez*, 10 Tex. 137.

⁶⁶ *State v. Canterbury*, 28 N. H. 195; *Warren v. Charlestown*, 2 Gray (Mass.) 84; *People v. President*, 9 Wend. (N. Y.) 351.

⁶⁷ *Bull v. Read*, 13 Grat. (Va.) 78; *State v. Noyes*, 30 N. H. 279; *People v. Salomon*, 51 Ill. 37; *City of Brunswick v. Finney*, 54 Ga.

clared by our courts to be a valid legislative condition precedent to the organization of a municipal corporation, with the result that the charter is impotent and the municipality non-existent until the people shall call it into being.⁶⁸ Moreover, under constitutional authorization to delegate legislative power for such purpose, special charters may be granted to municipal corporations by courts, commissioners, or boards thereunto authorized by act of the general assembly.⁶⁹

Delegated Powers.

A charter thus obtained from a sublegislature in all material particulars resembles the special charter of legislative enactment in form and effect. The court or board may be thus vested with plenary legislative discretion to specify and enumerate the powers to be conferred by the charter, and fix the boundaries of the municipality. The charter in such case will usually take the form of a judicial decree or board ordinance, and will be in all particulars subject to the general rules and doctrines of the law as applied to special legislative charters.⁷⁰

Particular Cases of Popular Approval and Acceptance.

It is likewise adjudged that certain provisions contained in a municipal charter, such as the power to incur a bonded indebtedness, may be made dependent upon the consent of the municipality.⁷¹ Certain it is that they are entirely consistent

317; *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; *Commonwealth v. Painter*, 10 Pa. 214; *State ex rel. Douglass v. Scott*, 17 Mo. 521.

⁶⁸ *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Foot v. Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737; *Smith v. McCarthy*, 56 Pa. 359; *State ex rel. Dome v. Wilcox*, 45 Mo. 458; *People v. Reynolds*, 10 Ill. 1; *People v. Gunn*, 85 Cal. 238, 24 Pac. 718.

⁶⁹ *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *State v. Leatherman*, 38 Ark. 81; *State v. Simons*, 32 Minn. 540, 21 N. W. 750.

⁷⁰ *Ashley v. Calliope*, 71 Iowa, 466, 32 N. W. 458; *State v. Goo-win*, 69 Tex. 55, 5 S. W. 678.

⁷¹ *State v. Waxahachie*, 81 Tex. 628, 17 S. W. 348; *Bank of Rome*

with the essential character of a municipal corporation, and with the genius of our American institutions, conceding to those most interested the right and power of self-government.⁷² In like manner, it is competent for the Legislature to make the continuance of the municipal organization dependent upon the continued public approval of the citizens, and to authorize them by public election to terminate and dissolve the corporation at will.⁷³ Such a clause might be included either in a special charter or in a general statute of the state.

Inherent Power in Legislature to Make Conditions.

All legislative power not exclusively withheld by Constitution is inherent in the general assembly, as the representative of the people; and, while this power may not be delegated, it is competent for the legislature to prescribe the condition upon which its special enactment may become law, just as under general statutes of incorporation it prescribes the mode by which municipalities may be brought into life by the local action of the inhabitants.⁷⁴

JUDICIAL NOTICE OF SPECIAL CHARTER.

57. The courts take judicial notice of the charter of a municipal corporation created by special act.

This seems to be the general consensus of judicial opinion in the United States,⁷⁵ though the contrary doctrine has pre-

v. Rome, 18 N. Y. 38; City of St. Louis v. Alexander, 23 Mo. 483; People v. Burr, 13 Cal. 343; Weaver v. Cherry, 8 Ohio St. 564.

⁷² Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; City of Paterson v. Society, 24 N. J. Law, 385; Commonwealth v. Painter, 10 Pa. 214.

⁷³ Corning v. Greene, 23 Barb. (N. Y.) 33.

⁷⁴ State v. Wilcox, 42 Conn. 364, 19 Am. Rep. 536; Commonwealth v. Dean, 110 Mass. 357; Sandford v. Common Pleas, 36 N. J. Law, 72, 13 Am. Rep. 422; New York Fire Department v. Kip, 10 Wend. (N. Y.) 267; Hobart v. Supervisors, 17 Cal. 23.

⁷⁵ City of Wetumpka v. Wharf Co., 63 Ala. 611; City of Savannah

vailed in a few of them, wherein it has been ruled that the charter of a municipality is a private act, and, like other private acts, must be pleaded and proven. This latter ruling seems to be consistent with elementary definitions and distinctions. Blackstone says:⁷⁶ "A general or public act is an universal rule that regards the whole community, and of this all courts of law are bound to take notice judicially and ex officio, without the statute being particularly pleaded. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons or private concerns." To which Bouvier adds, "Acts relating to any particular place," and says that "private acts are those of which the judges will not take notice without pleading,"⁷⁷ and, of course, proof also. Special charters of municipal corporations have been customarily printed in the United States in that section of the pamphlet acts of assemblies classified as private acts, and not among the public laws; and, in speaking of corporations, courts and authors unanimously recognize the distinction of special and general statutes, thereby recognizing a classification not stated by the law lexicographers, nor by Blackstone, who uses "public" and "general" as convertible terms.⁷⁸ But the great weight of judicial opinion, and the general practice thereunder, in the United States, warrants the statement of the text that municipal charters will receive judicial notice, though they are special and not general statutes.⁷⁹

v. Dickey, 33 Mo. App. 522; *City of Solomon v. Hughes*, 24 Kan. 211; *State v. Tosney*, 26 Minn. 262, 3 N. W. 345; *Dwyer v. Brenham*, 65 Tex. 526; *Potwin v. Johnson*, 108 Ill. 70; *BOW v. ALLENSTOWN*, 34 N. H. 351, 69 Am. Dec. 489; *Vreeland v. Bergen*, 34 N. J. Law, 438.

⁷⁶ Comm. vol. 1, 86.

⁷⁷ Law Dict. tit. "Act," "Legislation."

⁷⁸ Comm. vol. 1, *supra*.

⁷⁹ *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Toledo, P. & W. Ry. Co. v. Chenoa*, 43 Ill. 209; *Vreeland v. Bergen*, 34 N. J. Law, 439; *Virginia City v. Mining Co.*, 2 Nev. 86; *Swain v. Comstock*, 18 Wis. 463; *Oroville & V. R. Co. v. Plumas*, 37 Cal. 354; *State v. Mayor*, 11 Humph. (Tenn.) 217.

This fact entitles them to be classified as public statutes, even though they do relate to particular places only; and this is consistent with the purposes and functions of all public corporations, including municipalities. They may affect only particular localities, and yet be public in the accepted sense of that term, for "public" need not mean "universal."⁸⁰ This rule applies, therefore, not only when a clause in the special statute declares it to be a public statute, but without any provision to that effect, because of the public nature and purposes of a municipal corporation. It follows, of course, that, the charter being a public statute, all amendments and supplements thereto are likewise public.⁸¹

CERTIFICATE OF ORGANIZATION UNDER GENERAL LAW TO BE PLEADED.

58. But this rule does not apply to the charter of a city incorporated under a general statute, nor to the ordinances and by-laws of any municipality.

Such statutes, ordinances, and by-laws are not only special, but private, acts, and must be specially pleaded and proven, unless otherwise provided by statute.⁸²

MUNICIPALITIES UNDER GENERAL LEGISLATION.

59. The charter of a municipal corporation may be obtained and formulated under a general law declaring the powers, privileges, and immunities of the corporation, and authorizing its organization upon popular initia-

⁸⁰ "Public" is here used as the antithesis of "private."

⁸¹ *Newark City Bank v. Assessors*, 30 N. J. Law, 22; *Society for Propagation of Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 7 L. Ed. 927; *People v. Farnham*, 35 Ill. 562; *Arapahoe Village v. Albee*, 24 Neb. 242, 38 N. W. 738, 8 Am. St. Rep. 202.

⁸² *Harker v. Mayor*, 17 Wend. (N. Y.) 199; *Cox v. St. Louis*, 11 Mo. 431; *Trustees of Elizabethtown v. Lefler*, 23 Ill. 90; *Goodrich v. Brown*, 30 Iowa, 291; *City of New Orleans v. Boudro*, 14 La. Ann. 303.

tive by officers of the state exercising ministerial functions conferred for that purpose in the general statute.

The legislation of the various states upon this subject shows as great diversity of legislative thought and action as upon other subjects of general legislation, and quite as much ingenuity under particular inspiration as that for the benefit of private incorporations from the speculative influence of society.⁸³ Ordinarily the laws make a classification of municipal corporations according to population, and, while the usual powers of a municipality are conferred upon all alike, certain specified powers are provided for the various classes of cities and towns, suggested by and appropriate to the classification.⁸⁴ Under these statutes a required number of citizens of the proposed municipality initiate the movement for incorporation by some appropriate document, resulting in an enumeration of the voters within the proposed precincts, followed by a special election held by the election officer of the county to determine whether a majority of the people favor incorporation. If the vote is in the affirmative by the required majority, then an election is held for the officers necessary to organize the corporation and set it in motion.⁸⁵ In some states this choice is made at the first election; its efficacy being determined, of course, upon the vote in favor of incorporation. Instances are said to be rare in which the incorporation is defeated, if at the same election there may be candidates for the offices to be created thereby. The charter of the corporation thus created is sometimes authorized to be formulated by a court or board of officer designated in the act, whose function is ministerial only, and the resulting duty is an intelligent conformation of the general law to the particular corporation by specifying its name and municipal boundaries, and transcribing the grant of

⁸³ 1 Beach, Pub. Corp. §§ 16, 39; 1 Thomp. Priv. Corp. § 132.

⁸⁴ 1 Dill. Mun. Corp. § 41, note.

⁸⁵ State v. Tipton, 100 Ind. 73, 9 N. E. 704.

powers contained in the general incorporation statute. In states wherein a delegation of legislative power for municipal purposes is authorized by the Constitution, little difficulty arises in determining the validity of the charter and of the powers therein granted, since upon this sublegislature is conferred, *ex necessitate rei*, the legislative discretion.⁸⁶ But where the legislative grant of power to organize under general law is made without constitutional authority to delegate legislative power, the acts of these officers and boards, and even of the courts, are necessarily ministerial only;⁸⁷ and, if they in any such case are empowered to exercise legislative powers in the organization, such legislative acts are unconstitutional and void;⁸⁸ and, if the portion of the charter of this character is large, or is inseparable from the rest of the work, the entire charter will be void, and the corporation a nullity.⁸⁹

MUNICIPAL POWERS: EXPRESS — IMPLIED — INHERENT.

60. The municipality possesses no other powers than—

- (a) Those expressly enumerated in the charter;**
- (b) Such as are necessary for their appropriate use and execution;**
- (c) Such as are inherent in every municipal corporation.**

The inherent powers of a private corporation are well recognized and established by many judicial decisions, from an examination of which it will appear that the courts have not been illiberal in their implications. But the general rule with regard to implied powers is one of strict rather than liberal construction, with reference to all corporations, both public

⁸⁶ Cooley, Const. Lim. (6th Ed.) 78.

⁸⁷ Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246; 1 Mor. Priv. Corp. § 15; 1 Thomp. Priv. Corp. § 110; City of Morristown v. Shelton, 1 Head (Tenn.) 24.

⁸⁸ Ex parte Chadwell, 3 Baxt. (Tenn.) 98; Greeneville & P. R. Narrow Gauge R. Co. v. Johnson, 8 Baxt. (Tenn.) 332.

⁸⁹ Cooley, Const. Lim. (6th Ed.) 210-214.

and private;⁹⁰ and therefore it is wise and necessary that the charter should contain an enumeration of the powers and privileges intended to be granted the municipal corporation, and the duties to be imposed upon it. In the special charters these powers are varied in character and extent, and also in form.⁹¹ In the charters obtained under general statutes, the enumeration is generally abundant, and often tedious and redundant. This, however, within bounds, is preferable to the omission of powers intended to be granted, and leaving them to the doubtful source of judicial implication.

NO PARTICULAR FORM OF CHARTER REQUIRED.

- 61. A municipal charter requires for its validity no particular form of words, but is valid and effective if the language employed manifests legislative intention thereby to erect a municipality.**

As we have heretofore seen, the words usually employed to establish a corporation are "found," "erect," "establish," "create," or "incorporate";⁹² but none of them is essential. If the words employed in the charter grant the powers essential to a corporation, or otherwise evince the intention of the legislature to found a municipal corporation by that particular act of legislation, then the charter is sufficient for that purpose, and the municipality is accordingly created.⁹³ The absence of express provisions respecting the incidents which are inherent in a corporation, such as the power to sue and be sued, to have a seal, or to enact by-laws, does not render the charter void;⁹⁴ and in more than one case it has been decided that the omission of the name of the corporation is not a fatal defect, provided the same may be inferred from the terms of the

⁹⁰ Clark, Priv. Corp. § 58; 1 Dill. Mun. Corp. § 91.

⁹¹ 1 Beach, Pub. Corp. §§ 67-69.

⁹² 1 Kyd, Corp. 62; 2 Kent, Comm. 27.

⁹³ 1 Dill. Mun. Corp. §§ 42, 43.

⁹⁴ 1 Kyd, Corp. 63; CONSERVATORS v. ASH, 10 Barn. & C. 349.

charter.⁹⁵ Indeed, it may be regarded as settled law that a corporation may be created by implication, as well as by the use of the customary words in the charter.⁹⁶ But the implication must be natural and necessary, and if, besides the absence of the usual words of incorporation, and the omission of the essential properties thereof, there is no language from which either may be implied by the use of the recognized rules of interpretation, then the charter is essentially defective, and the municipality is not created thereby.⁹⁷

LEGISLATIVE POWER TO REPEAL CHARTER.

62. A municipal charter, whether granted by special law or obtained under general laws, may be repealed by legislative act, either general or special, unless forbidden by the Constitution.

It is not the purpose here to consider the effect of such repeal, but only the power and method thereof. We have seen that a municipal charter is not a contract, but merely a sovereign act of legislation, and therefore it is not preserved or protected by the contract clause of the federal Constitution.⁹⁸ In the exercise of its inherent sovereign power, the legislature may not only enact, but repeal, laws, in its discretion. A special charter is only a special law, and is therefore subject to repeal in such manner as the legislature may choose to proceed.⁹⁹ A municipal corporation organized under general incorporation laws becomes thereby only an agency of the government for more efficient local administration, and this agency

⁹⁵ *School Com'rs v. Dean*, 2 Stew. & P. (Ala.) 190; *Trustees of Ministerial and School Fund v. Parks*, 10 Me. 441.

⁹⁶ 1 Dill. Mun. Corp. § 42.

⁹⁷ *Stebbins v. Jennings*, 10 Pick. (Mass.) 172; *Wells v. Burbank*, 17 N. H. 393; *Medical Inst. Geneva College v. Patterson*, 5 Denio (N. Y.) 618; *Myers v. Irwin*, 2 Serg. & R. (Pa.) 368.

⁹⁸ *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

⁹⁹ *SLOAN v. STATE*, 8 Blackf. (Ind.) 361.

may be revoked at any time by the state, as principal.¹⁰⁰ The property rights of the citizens, or of such creditors as there may be upon such repeal, will be considered hereafter. At present, we have to do only with the power of revocation. This power the state undoubtedly possesses, and it may terminate the agency at its pleasure by repeal of the charter which created the agency, whether this charter is under special or general law, for both are subject to repeal.

Repeal.

Legal learning upon the subject of repeal of statutes is vast, varied, and confusing. It is easy to see how a special statute may be repealed by another special statute, and also how a general statute may be repealed by another general statute. Little difficulty arises from such appropriate and express legislation, but the subject of repeal of a general statute by a special one, and a special statute by a general one, has been a prolific source of legal disputation and judicial consideration.¹⁰¹ It has furnished a fine field for the excursions of legal authors, and the amount of learning upon this subject of repeal of statutes in these matters is so great as to be embarrassing. A detailed examination of the rules and cases upon this subject cannot be made within the prescribed limits of this work. It must suffice to say that the fundamental doctrines of the law upon this subject are generally applicable to the repeal of charters of municipal corporations. These numerous cases and rules seem, for the most part, to be special instances under the particular application of the general doctrine of repeal by implication. If the subsequent statute plainly manifests the unmistakable intention of the legislature that the provisions of the former

¹⁰⁰ GIRARD v. PHILADELPHIA, 7 Wall. (U. S.) 1, 19 L. Ed. 53; Cobb v. Kingman, 15 Mass. 197; BERLIN v. GORHAM, 34 N. H. 266; Town of Granby v. Thurston, 23 Conn. 416; People v. Tweed, 63 N. Y. 202; Crook v. People, 106 Ill. 237; Scoville v. Cleveland, 1 Ohio St. 126; Smith v. Adrian, 1 Mich. 495; Lynch v. Laffland, 4 Cold. (Tenn.) 96; Boyd v. Chambers, 78 Ky. 140.

¹⁰¹ 1 Dill. Mun. Corp. §§ 85-88; 1 Beach, Pub. Corp. c. 4.

statute shall no longer be in operation, then the repeal is effected; otherwise the former statute generally remains in operation, even though the two statutes may not be harmonious.¹⁰² A special charter may thus be repealed not only by a special act, but also by a general act of legislation declaring that all municipal charters, or all of a certain class, including the one in question, are repealed, or enacting that the corporations are or shall be dissolved.¹⁰³ So a charter under a general incorporation act may be repealed by special public law enacted for that particular purpose, as well as by a general statute, or by constitutional provision necessarily repugnant to, and irreconcilable with, the previous law.¹⁰⁴

Method of Repeal.

How the charter of a municipal corporation organized under general law may be practically repealed is an interesting matter of inquiry, and has been the subject of much judicial consideration. It has been urged that such a charter, being the result of the exercise of ministerial power, is not a proper subject for legislative repeal, and that the repeal of the general law under which it was organized will not affect the status of the municipality as a corporate body endowed with all necessary powers and functions.¹⁰⁵ But this contention is based

¹⁰² *Town of Montezuma v. Minor*, 70 Ga. 191; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Village of St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *Gorum v. Mills*, 34 N. J. Law, 177.

¹⁰³ *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *Crook v. People*, 106 Ill. 237; *Wallace v. Trustees*, 84 N. C. 164; *Daniel v. Mayor*, 11 Humph. (Tenn.) 582; *State v. Mayor*, 24 Ala. 701; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *Worthley v. Steen*, 43 N. J. Law, 542; *SLOAN v. STATE*, 8 Blackf. (Ind.) 361.

¹⁰⁴ *City of Griffin v. Inman*, 57 Ga. 370; *Bond v. Hiestand*, 20 La. Ann. 139; *Hammond v. Haines*, 25 Md. 541, 90 Am. Dec. 77; *State v. Willson*, 12 Lea (Tenn.) 246; *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378; *Union Pac. Ry. Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098.

¹⁰⁵ This assumes that the ministerial structure may outlive its

upon a misconception of the nature of a municipal corporation, and the sovereign legislative power of the state. Of course, where the Constitution forbids, the legislature may not pass any special statute affecting a municipal corporation, and therefore it may not repeal any charter by a special act. But in the absence of any such constitutional inhibition, the legislature, exercising the plenary legislative power of the state, may repeal any municipal charter by any recognized mode of legislation.¹⁰⁶ By a single act it may repeal a single municipal charter, or the municipal charters of a certain class of corporations, or all charters of all the municipal corporations within the state. Moreover, the legislature may not only repeal the general incorporation act under which municipal corporations have been organized, but, unless forbidden by the Constitution, it may by appropriate legislation, in effect, repeal the charter of any municipal corporation organized and existing under the general law. This is only to repeat that the legislature, representing the power of the state, may, by special legislation, when not forbidden by the Constitution, recall the governmental powers and authority with which it has endowed a municipal corporation as an agency of the state, in any manner whatsoever.¹⁰⁷ As the form of the grant of power—that is, the giving of the charter—was not material, so the form of revocation of such power is not material.

legislative foundation—may stand after the substructure is removed. Such a postulate would equally well preserve a municipality after repeal of its special charter, which is impossible. *SLOAN v. STATE*, 8 Blackf. (Ind.) 361.

¹⁰⁶ *Bloomer v. Stolley*, 5 McLean, 158, Fed. Cas. No. 1,559; *United States v. Port of Mobile* (C. C.) 12 Fed. 768, note; *Cooley*, Const. Lim. (6th Ed.) c. 5, p. 147.

¹⁰⁷ *LUEHRMAN v. TAXING DIST.*, 2 Lea (Tenn.) 425; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *CITY OF MEMPHIS v. WATER CO.*, 5 Heisk. (Tenn.) 495; *Buford v. State*, 72 Tex. 182, 10 S. W. 401; *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378.

CHAPTER IX.**LEGISLATIVE CONTROL.**

63. Governmental Functions, Public Affairs and Property.
64. Municipal Officers Charged With Performance of Governmental Functions.
65. Public Funds and Revenues.
66. Franchises.
67. Contracts and Obligations.
68. Obligations Imposed by Legislature.
69. Property.
70. Public Thoroughfares.

GOVERNMENTAL FUNCTIONS, PUBLIC AFFAIRS AND PROPERTY.

- 63. In addition to creation, alteration, and dissolution of a municipal corporation, the legislature, by virtue of its sovereign powers, may exercise supervisory control over its governmental functions, and public affairs and property.**

The legislative control of municipal corporations during their existence is a necessary corollary of the legislative power to create and to dissolve such corporations. They are, as we have seen, public agencies for the administration of government.¹ Primarily and chiefly, they are organized to promote the welfare of the citizens of the municipality.² They are rarely established for rural communities, but are demanded by the necessities of urban life.³ A municipal corporation is

¹ 2 Bouv. Law Dict. 21; 2 Kent, Comm. 275; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325, 334.

² 1 Dill. Mun. Corp. §§ 12, 20; *PEOPLE v. MORRIS*, supra; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 180; *East Tennessee University v. Knoxville*, 6 Baxt. (Tenn.) 166.

³ *State ex rel. Attorney General v. Schweickardt*, 109 Mo. 496,

peculiarly a government of the people, by the people, and for the people residing within the corporate limits.⁴ And yet one of the chief functions of such a corporation is the due enforcement of certain criminal laws of the state, and the local exercise of the police power thereof.⁵ Not only the citizens of the municipality, but all who come within its boundaries, are

19 S. W. 47; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

"The fundamental idea of a municipal corporation, proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government. Indeed, the necessity for such corporations springs from the existence of centers or agglomerations of population, having, by reason of density and numbers, local or peculiar interests and wants, not common to adjoining sparsely settled or agricultural regions. It is necessary to draw the line which divides the limits of the place and people to be incorporated. This is with us a legislative function." 1 Dill. Mun. Corp. § 183.

⁴ Cooley, Const. Lim. (6th Ed.) 139; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

⁵ *State v. Pender*, 66 N. C. 313; *Egleston v. City Council*, 1 Mill. Const. (S. C.) 45; *City Council of Charleston v. King*, 4 McCord (S. C.) 487; *City Council v. Pepper*, 1 Rich. Law (S. C.) 364; *Rector v. State*, 6 Ark. 187; *Lewis v. State*, 21 Ark. 209; *Durr v. Howard*, 6 Ark. 461; *Ex parte Slattey*, 8 Ark. 484; *Smith, Mun. Corp.* § 1320; *Elliott, Mun. Corp.* § 89; *Commonwealth v. Roark*, 8 Cush. (Mass.) 210; *Commonwealth v. Pindar*, 11 Metc. (Mass.) 539; *Brown's Case*, 152 Mass. 1, 24 N. E. 857; *Myers v. People*, 26 Ill. 173; *Borough of St. Peter v. Bauer*, 19 Minn. 327 (Gil. 282); *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270; *People v. Ah Ung* (Cal.) 28 Pac. 272; *State v. Cram*, 84 Me. 271, 26 Atl. 853; *People v. Gooseman*, 80 Mich. 611, 45 N. W. 369; *People v. Brown*, 80 Mich. 615, 45 N. W. 371; *People v. Hulett*, 61 Hun, 620, 15 N. Y. Supp. 630. See, also, *Cranston v. Augusta*, 61 Ga. 572; *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857; *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3; *Monroe v. City of Lawrence*, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; *PEOPLE v. BENNETT*, 83 Mich. 457, 47 N. W. 250; *Ogden City v. McLaughlin*, 5 Utah, 387, 16 Pac. 721; *State v. Orr*, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279; *Welch v. Boston*, 126 Mass. 442, note. Also, Const. Tenn. art. 6, § 1.

subject to its jurisdiction. Its authority extends over these as well as the persons who are either permanently or temporarily within this jurisdiction.⁶ The exercise of its functions requires lands, goods, chattels, and money. The corporation must buy and sell.⁷ It incurs obligations which must be discharged. This property and these obligations may be strictly municipal, or they may be public in the wider sense.⁸ Out of this complex body, with its varied powers, purposes, and properties, and the administration of its affairs, must arise, therefore, many kinds of local rights, powers, and obligations, conflicting and complicated. Where property is bought and held specially for local purposes, the local community have a special interest therein, as has also the creditor who has furnished money for its purchase; both are interested in its value and continued ownership by the corporation.⁹

⁶ The people coming within the limits of the city are regarded for the time being as inhabitants, and liable in the same manner for violations of laws. *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670; *City of Knoxville v. King*, 7 Lea (Tenn.) 441; *Village of Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *City Council of Charleston v. Pepper*, 1 Rich. Law (S. C.) 364; *Strauss v. Pontiac*, 40 Ill. 301; *Horney v. Sloan, Smith* (Ind.) 136; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *In re Vandine*, 6 Pick. (Mass.) 187, 17 Am. Dec. 351; *Gosselink v. Campbell*, 4 Clarke (Iowa) 296; *Kennedy v. Sowden*, 1 McMul. (S. C.) 323.

⁷ *Mt. Hope Cemetery v. City of Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515; *KETCHUM v. BUFFALO*, 14 N. Y. 356; *Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich*, 153 Mass. 42, 26 N. E. 239; *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; *Richmond & M. P. Land, Navigation & Improvement Co. v. West Point*, 94 Va. 668, 27 S. E. 460; *McDonogh's Ex'r v. Murdoch*, 15 How. (U. S.) 367, 14 L. Ed. 732.

⁸ Dill. Mun. Corp. § 66.

⁹ *PEOPLE v. INGERSOLL*, 58 N. Y. 1, 17 Am. Rep. 178; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Jones v. New Haven*, 34 Conn. 1; *BAILEY v. MAYOR*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375; *Small v. Danville*, 51 Me. 359; *NICHOL v. NASH-*

Illustrations.

This may be illustrated in the matter of waterworks, gas-works, electric plants, and the like, which, though owned by the city, have a peculiarly private nature, and are protected by the state for the use of those interested when the corporation is dissolved.¹⁰ Other items of property, such as streets, market places, public squares, and the like, represent the property held for public use.¹¹ The authority of the legislature to control mu-

VILLE, 9 Humph. (Tenn.) 252; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Howe v. New Orleans*, 12 La. Ann. 481; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *Niles Waterworks Co. v. City of Niles*, 59 Mich. 311, 26 N. W. 525; *Commonwealth v. Philadelphia*, 132 Pa. 288, 19 Atl. 136; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 180; *Safety Insulated Wire & Cable Co. v. Baltimore*, 66 Fed. 140, 13 C. C. A. 375; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *City of Louisville v. Commonwealth*, 1 Duv. (Ky.) 295, 85 Am. Dec. 624; *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *In re Malone's Estate*, 21 S. C. 435; *United States v. Railroad Co.*, 17 Wall. (U. S.) 332, 21 L. Ed. 597.

¹⁰ *Union Tp. v. Rader*, 41 N. J. Law, 617; *Amy v. Selma*, 77 Ala. 103; *Rader v. Road District*, 36 N. J. Law, 273; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *City of Clinton v. Railway Co.*, 24 Iowa, 455; *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 248; *Fish v. Branin*, 23 N. J. Law, 484; *President, etc., of City of Paterson v. Society*, 24 N. J. Law, 386; *VON HOFFMAN v. QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Butz v. Muscatine*, 8 Wall. (U. S.) 575, 19 L. Ed. 490.

But see, *contra*, *Coyle v. McIntire*, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109, where it was held that a municipal corporation does not hold property for the purpose of furnishing its inhabitants with water, as a private corporation, so as to prevent the legislature from modifying the management thereof at will. See, also, *SPRINGFIELD FIRE & MARINE INS. CO. v. KEESEVILLE*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667.

¹¹ *Elliott, Roads & S.* § 656; *City of Council Bluffs v. Railroad Co.*, 45 Iowa, 338, 24 Am. Rep. 773; *State v. Railroad Co.*, 29 Fla. 590, 10 South. 590; *Duval County Com'rs v. Jacksonville*, 36 Fla.

municipal property and affairs does not include the property and affairs which are of a private nature,¹² and all legislative acts controlling or disposing of the property and valuable franchises of municipal corporations are subject to the limitations necessary for the protection of the vested and peculiar rights of the people and creditors of the municipality in its quasi private affairs.¹³ By this term is not meant to include those kinds of property in a city which may be owned and controlled for the use of the citizens either by the city or by some private corporation or individual. Property of this kind, when owned and used by the city for the convenience of its citizens, and as a source of revenue for itself, has been generally held to be controlled and protected by the same rules of law as if it were owned by a private corporation, and therefore is not subject

196, 18 South. 339, 29 L. R. A. 416; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299. See, also, *People v. Kerr*, 27 N. Y. 188, where the court said, with reference to the holding of streets by the corporation, that it "is as directly under the power and control of the legislature for any public purpose as any property held by the state or any public body or officers, and its application cannot be challenged by a corporation, which, in respect to such property at least, is a mere agent of the sovereign power of the people."

¹² *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 248; *City of Clinton v. Railroad Co.*, 24 Iowa, 455; *City of Louisville v. University*, 15 B. Mon. (Ky.) 642; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *People v. Kerr*, 27 N. Y. 188; *Mercer v. Railroad Co.*, 36 Pa. 99; *Mayor, etc., of City of New Orleans v. Hopkins*, 13 La. 326; *New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 517; *Councils of Reading v. Commonwealth*, 11 Pa. 196, 51 Am. Dec. 534; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

¹³ *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; 1 Smith, Mun. Corp. § 1702. The legislature of a state has no right to interfere with and control by compulsory legislation the action of municipal corporations with respect to property and contracts rights of purely local concern. *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605.

to discretionary legislative control.¹⁴ So, also, the lands or other property which have been acquired by a municipal corporation by gift or purchase for local uses.¹⁵

MUNICIPAL OFFICERS CHARGED WITH PERFORMANCE OF GOVERNMENTAL FUNCTIONS.

64. In the absence of constitutional inhibition, the legislature has unlimited power of control over those municipal officers who are charged with the performance of governmental functions devolved upon it, but cannot interfere with those officers who perform functions of a distinctly municipal character.

This power is illustrated in many of the states by the creation of what is known as the "metropolitan police" for the larger cities. This police force is usually appointed and controlled by a board of commissioners, chosen either by the legislature or Governor of the state, as an exercise of the sovereign power of legislation and patronage.¹⁶ In Indiana it has

¹⁴ *People v. Kerr*, 27 N. Y. 188; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 517; *Town of Southampton v. Oyster Co.*, 116 N. Y. 1, 22 N. E. 387; *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 248; *Cummings v. City of St. Louis*, 90 Mo. 259, 2 S. W. 130; *Mt. Hope Cemetery v. City of Boston*, 158 Mass. 509, 83 N. E. 695, 35 Am. St. Rep. 515; *City of Wellington v. Township*, 46 Kan. 213, 26 Pac. 415; *Reading v. Commonwealth*, 11 Pa. 196, 51 Am. Dec. 534; *State ex rel. Attorney General v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Mercer v. Railroad Co.*, 86 Pa. 99.

¹⁵ *Webb v. Mayor*, 64 How. Prac. (N. Y.) 10; *Terrett v. Taylor*, 9 Cranch (U. S.) 52, 8 L. Ed. 650; 2 Kent, Comm. 257. See cases cited in note 14.

¹⁶ *CITY OF BALTIMORE v. STATE*, 15 Md. 376, 74 Am. Dec. 572; *PEOPLE v. DRAPER*, 15 N. Y. 532; *People v. Albertson*, 55 N. Y. 50; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. McDonald*, 69 N. Y. 362; *People v. Mahaney*, 18 Mich. 481; *State v. Covington*, 29

been held that this power to interfere with local self-government is forbidden by its Constitution,¹⁷ and it is difficult to restrain the expression of a wish that this essentially American feature of home rule were likewise protected in all the states. The chief difficulty in the application of this legislative power lies in determining what offices are governmental and what municipal. Upon this line of contention the courts of various states have divided as to committees for parks and streets and water supply.¹⁸ There is, however, unanimity of judicial opinion that the legislature may provide for the appointment of the members of a municipal police force by a board of commissioners,¹⁹ while the mayor has been held to be

Ohio St. 102; *STATE v. DENNY*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177. But see *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

¹⁷ *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *STATE v. DENNY*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

¹⁸ *PEOPLE v. DRAPER*, 15 N. Y. 532; *Daley v. St. Paul*, 7 Minn. 390 (Gil. 311); *St. Louis County Court v. Griswold*, 58 Mo. 175. See, also, *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *People v. Albertson*, 55 N. Y. 50; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

¹⁹ "The power of the legislature to provide for the appointment of the members of a municipal board of police has been affirmed in every instance in which it has been so challenged and presented as to require the judgment of courts. Those courts which hold to the doctrine that the control of matters of purely local concern cannot be taken from the people of the locality place their decisions upon the ground that the selection of purely peace officers is not a local matter, but is one of state concern, inasmuch as such officers belong to the constabulary of the state. But while the reasoning of the courts is diverse, the ultimate conclusion reached by all the cases is the same." Elliott, C. J., in *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *CITY OF BALTIMORE v. STATE*, 15 Md. 376, 74 Am. Dec. 572; *People v. Mahaney*, 13 Mich. 481; *PEOPLE v. DRAPER*, 15 N. Y. 532; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278.

a municipal officer, and his office not subject to state control.²⁰ To the contention that taxation and representation go together, the Supreme Court of Maryland replied: "Every city is represented in the state legislature, and it is for that body to determine how much power shall be conferred by the municipal charters which it grants, and to fix the salary which police officers shall receive, and to require a payment by those who get the benefit of their services."²¹

PUBLIC FUNDS AND REVENUES.

65. The legislature has the same power over the public revenues of a municipality as over the immediate funds of the state, and in the exercise of this authority it may appropriate these revenues to any public purpose conducive to the public good.

The ordinary revenues of a city are not its property in the sense in which private property is held by an individual. Such revenues belong to the public, and the collection and appropriation thereof by a city is the exercise of a trust function by the municipality for the benefit of the public. The legislature is the representative of the public in this as well as other matters, and it may change these public revenues from one public object to another at its discretion.²² The doctrine is generally recognized that no municipal corporation can have any vested right in the powers conferred upon it for governmental purposes.²³ Therefore revenues raised by taxation, though levied

²⁰ *Britton v. Steber*, 62 Mo. 370; *State ex rel. Wingate v. Valle*, 41 Mo. 29. But see *Attorney General v. Common Council*, 112 Mich. 445, 70 N. W. 450, 37 L. R. A. 211.

²¹ *City of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

²² *Creighton v. Board*, 42 Cal. 446. In *Board of Sup'rs of Sangamon County v. City of Springfield*, 63 Ill. 66, it was held that the revenues are the result of taxation exercised for the public good, and the public interest requires that the legislature shall have power to direct and control their application.

²³ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *PEOPLE*

for specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the municipality.²⁴ In an early Illinois case it was decided that the legislature had authority to repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, the fees of which were directed to be appropriated to the support of city paupers, Judge Caton in the opinion remarking that the charter power to license "gives the city no more a vested right to issue licenses because the Legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city."²⁵ When the city of Lafayette was consolidated with New Orleans it was provided that the respective obligations of the two cities should rest upon and be borne by the former territory of the two cities severally; but this just and equitable arrangement was, over the protest of the people of Lafayette, whose burden had been light, soon changed by a statutory provision requiring all portions of the consolidated city to bear equal parts of taxation. The Supreme Court of Louisiana answered the complaint of the citizens of Lafayette with a repetition of the fundamental doctrine that public corporations are wholly under the control of the legislature, and it may provide in what manner taxes shall be levied to support them and pay their debts.²⁶

v. MORRIS, 13 Wend. (N. Y.) 335. In *City of St. Louis v. Shields*, 52 Mo. 351, the court said: "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right, as against the government, in any individual or body of men." See, also, *VON HOFFMAN v. QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403.

²⁴ *People v. Power*, 25 Ill. 187; *VON HOFFMAN v. CITY OF QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403. "However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principles which secure the inviolability of contracts." *United States v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395.

²⁵ *GUTZWELLER v. PEOPLE*, 14 Ill. 142. See, also, *SANGAMON CO. v. SPRINGFIELD*, 63 Ill. 66; *Richland Co. v. Lawrence Co.*, 12 Ill. 1.

²⁶ *LAYTON v. NEW ORLEANS*, 12 La. Ann. 515.

Authority in Public Matters only.

This power of the Legislature to control municipal funds applies only to the strictly public or governmental revenues of the city, and rests obviously upon the sovereign legislative power of the state in all public matters. This power of control does not exist with regard to property in which the municipality has a private interest or creditors have a vested right.²⁷ Public revenues, however, are not regarded as private property, nor has any one a vested right in them until after their actual appropriation.²⁸ That this power pertains to public benefits was judicially declared and maintained in the celebrated case of *State v. Railroad Co.*, decided by the Supreme Court of Maryland in 1842, and affirmed by the Supreme Court of the United States in 1844.²⁹ The railroad company accepted a charter requiring it to locate and build its road through three certain towns, upon penalty, in case of failure, that it should forfeit \$1,000,000 to the state of Maryland for the use of Washington county. After action brought to recover the penalty, the legislature repealed that clause of the charter which imposed the penalty, and thereupon, under a plea puis darrein continuance, it was held that the county could not recover, since it was obtained for the state; and the penalty was released.³⁰ Here again it was declared that the

²⁷ *STATE EX REL. MARCHAND v. NEW ORLEANS*, 37 La. Ann. 13; *United States v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Louisiana ex rel. Southern Bank v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090; *Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; *VON HOFFMAN v. CITY OF QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 17 L. Ed. 305; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

²⁸ *Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920; *VON HOFFMAN v. CITY OF QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Pereles v. City of Watertown*, 6 Biss. 79, Fed. Cas. No. 10,980.

²⁹ *STATE v. RAILROAD CO.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319, affirmed 3 How. 534, 11 L. Ed. 714.

³⁰ *Id.*

corporation had no vested right in such a fund as this, but that the same was under the sovereign control of the legislature.

Examples of Power.

This is the general rule with regard to public property owned and controlled by the municipality as trustee or representative of the public for public use, which could not be held by private individuals for such use. As a consequence, the legislature has full power over the revenues of a corporation, the source of which it may prescribe and alter at its pleasure.⁸¹ It may give or it may withhold, for example, the power to grant and tax licenses for various occupations;⁸² also the power to levy and collect wharfage or ferriage,⁸³ or penalties for breach of law or of contract.⁸⁴ It may ratify void local

⁸¹ *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871; *People v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *McGee v. Salem*, 149 Mass. 238, 21 N. E. 386; *Northampton Co. v. Railway Co.*, 148 Pa. 282, 23 Atl. 895; *Lucas v. Board*, 44 Ind. 524; *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245; *Anderson v. Mayfield*, 93 Ky. 230, 19 S. W. 598; *Tice v. Mayfield*, Id.; *People v. Fields*, 58 N. Y. 491; *Home Ins. Co. v. City Council*, 93 U. S. 116, 23 L. Ed. 825; *Terrel v. Wheeler*, 123 N. Y. 76, 25 N. E. 329; *Youngs v. Hall*, 9 Nev. 212; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Board of Education v. Commissioners*, 107 N. C. 110, 12 S. E. 190; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446; *Love v. Schenck*, 84 N. C. 304.

⁸² *SANGAMON COUNTY v. SPRINGFIELD*, 63 Ill. 71; *City of Richmond v. Railroad Co.*, 21 Grat. (Va.) 604; *People v. Meyer*, 5 N. Y. Supp. 60; *People v. Power*, 25 Ill. 187; *Richland Co. v. Lawrence Co.*, 12 Ill. 1; *Mendocino Co. v. Bank*, 86 Cal. 255, 24 Pac. 1002; *Grantham v. State*, 89 Ga. 121, 14 S. E. 892; *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. Ed. 825.

⁸³ *City of St. Louis v. Shields*, 52 Mo. 351.

⁸⁴ *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *State v. Railroad Co.*, 12 Gill. & J. (Md.) 399, 38 Am. Dec. 319; *Maryland v. Same*, 3 How. (U. S.) 534, 11 L. Ed. 714; *Holliday v. People*, 5 Gilman (Ill.) 216; *Conner v. Bent*, 1 Mo. 235; *Coles v. Madison Co.*, *Breese* (Ill.) 154, 12 Am. Dec. 161; *Chicago & A. R. Co. v. Adler*, 56 Ill. 344.

assessments;⁸⁸ it may compel the satisfaction by the city of nonlegal claims against it;⁸⁹ it may regulate the use of streets, highways, and other public places;⁹⁰ it may transfer the control of the parks, streets, and other public places to a board of commissioners appointed by the state.⁹¹ It may also create and appoint a board of police commissioners, and regulate the compensation for them and for the police officers of the municipality, and compel their payment out of the municipal treasury.⁹² In short, it has been repeatedly adjudicated that the legislature has the same power over the revenues of the

⁸⁸ *City of Baltimore v. Horn*, 26 Md. 194; *Great Falls Ice Co. v. District of Columbia*, 19 D. C. (U. S.) 327; *Lennon v. New York*, 55 N. Y. 361.

⁸⁹ *THOMAS v. LELAND*, 24 Wend. (N. Y.) 65; *Creighton v. Board*, 42 Cal. 446; *People of State of New York v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 654, 24 L. Ed. 521; *CITY OF GUILFORD v. SUPERVISORS*, 13 N. Y. 143; *People v. Supervisors*, 70 N. Y. 228; *Baker v. Seattle*, 2 Wash. St. 576, 27 Pac. 462; *Smith v. Morse*, 2 Cal. 524; *Grogan v. San Francisco*, 18 Cal. 590; *Brewster v. Syracuse*, 19 N. Y. 116; *Wilder v. East St. Louis*, 55 Ill. 133; *United States v. Railroad Co.*, 17 Wall. (U. S.) 322, 21 L. Ed. 597; *City of Philadelphia v. Field*, 58 Pa. 320; *Mayor, etc., of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Mayor, etc., of New York v. Bank*, 110 N. Y. 446, 18 N. E. 618; *People v. Mayor*, 4 Comst. (N. Y.) 419, 55 Am. Dec. 266; *State v. Hampton*, 13 Nev. 441; *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 141; *People v. Burr*, 13 Cal. 343.

The legislature has power to charge the payment of a deficiency against a city for liability incurred in excess of its charter limitation, so far as the claims are based on an equitable or a legal ground. *City of Syracuse v. Hubbard*, 64 App. Div. 587, 72 N. Y. Supp. 802.

⁹⁰ *Appeal of McGee*, 114 Pa. 470, 8 Atl. 237; *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *People v. Railroad Co.*, 45 Barb. (N. Y.) 73; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171.

⁹¹ *People v. Walsh*, *supra*; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155.

⁹² *Mayor, etc., of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *PEOPLE v. MAHANEY*, 13 Mich. 481; *PEOPLE v. DRAPER*, 15 N. Y. 532.

municipality that it has over the funds of the state, and may thus direct their application to such purposes as it deems appropriate for the public welfare.⁴⁰

Political Power Conferred not a Vested Right.

All of these powers, and many others pertaining to the contracts and obligations of the city, are based upon the proposition that political power conferred by the legislature cannot become a vested right, as against the government, in any individual or body of men.⁴¹ Such power exists subject to the legislative will, and may be withdrawn at any time, subject to constitutional limitations; and so far has this doctrine been carried in Iowa,⁴² and some other states, that it has been held that the legislature may compel a city to pay a debt incurred by a municipality in excess of the legislative limitation upon indebtedness, which is a very practical overruling of the doctrine of ultra vires. If the limitation be placed by constitution, such power does not exist in the legislature.⁴³ So, too,

⁴⁰ *Richland County v. Lawrence County*, 12 Ill. 1; *Palmer v. Fitts*, 51 Ala. 489; *Payne v. Treadwell*, 16 Cal. 220; *City of San Francisco v. Canavan*, 42 Cal. 541; *Rawson v. Spencer*, 113 Mass. 40; *Weymouth & B. Fire Dist. v. Commissioners*, 108 Mass. 142; *Town of Beloit v. Morgan*, 7 Wall. (U. S.) 619, 19 L. Ed. 205; *Town of Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Trustees of Schools v. Tatman*, 13 Ill. 28; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *Love v. Schenck*, 34 N. C. 304.

It is within the power of the legislature to impose a tax upon a particular subdivision of a municipality of the state when in its judgment it is for the benefit of the locality as well as of the state at large. *Young v. Kansas City*, 152 Mo. 661, 54 S. W. 535. See *PRINCE v. CROCKER*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

⁴¹ *UNITED STATES v. NEW ORLEANS*, 108 U. S. 358, 26 L. Ed. 395; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 335.

⁴² *Scott v. Davenport*, 34 Iowa, 208; *City of Syracuse v. Hubbard*, 64 App. Div. 587, 72 N. Y. Supp. 802; *Mosher v. School Dist.*, 44 Iowa, 122.

⁴³ *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 644, 24 L. Ed. 521; *Crelghton v. Supervisors*, 42 Cal. 446.

the legislature may direct and levy compulsory taxes upon a corporation when necessary to perform its duties or discharge its valid obligations.⁴⁴ Likewise the state may compel the assessment and disbursement of public revenue for the erection and support of schoolhouses and schools,⁴⁵ public highways,⁴⁶ bridges, and canals,⁴⁷ or any other matters which are state concerns as distinguished from municipal.

FRANCHISES.

66. Public franchises held by a municipal corporation under legislative grant may be altered or revoked at the legislative will.

The franchise to be a corporation, which is held to belong to the corporators of a private corporation, and to be protected by the contract clause of the federal Constitution, is obviously as to municipalities a matter of merely public concern, and therefore under the legislative control in all particulars and at all times, as we have heretofore seen in considering the subject

⁴⁴ *Memphis v. Brown*, 97 U. S. 300, 24 L. Ed. 924; *Vance v. Little Rock*, 30 Ark. 435, 439; *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 644, 24 L. Ed. 521; *LAYTON v. NEW ORLEANS*, 12 La. Ann. 515; *Eschenburg v. Commissioners*, 129 Ind. 398, 23 N. E. 865; *Maltby v. Tautges*, 50 Minn. 248, 52 N. W. 858; *Hawkins v. Jonesboro*, 63 Ga. 527; *Little v. Commissioners*, 40 N. J. Law, 397; *City of San Francisco v. Canavan*, 42 Cal. 541; *Carpenter v. People*, 8 Colo. 118, 5 Pac. 828; *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699.

⁴⁵ *State v. Blue*, 122 Ind. 600, 23 N. E. 963; *State Board of Education v. Aberdeen*, 56 Miss. 518; *School Dist. No. 1 v. Weber*, 75 Mo. 558.

⁴⁶ *People v. Supervisors*, 50 Cal. 561; *People v. Flagg*, 46 N. Y. 401; *Jensen v. Supervisors*, 47 Wis. 298, 2 N. W. 320.

⁴⁷ *Gulder v. Otsego*, 20 Minn. 74 (Gil. 59); *City of Philadelphia v. Field*, 58 Pa. 320; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 169.

of the charter.⁴⁸ All municipal franchises are subjects of legislative grant, and, whether granted to third persons or to the corporation itself, may be revoked before the grantee has performed the public service imposed as a condition of the grant.⁴⁹ For example, the right to construct waterworks, gasworks, or electric plants, and to supply the city and its citizens with these public utilities necessary for an urban population in modern times, may be granted either to the municipality or to a private corporation organized for that purpose. Before the work has been done to construct these public utilities, the state may repeal the law by which they were granted, and thus revoke the franchises;⁵⁰ but with regard to private corporations these franchises, as soon as the works are completed, become contracts, protected by the rule in the Dartmouth College Case, and no law can be passed by the state to impair the obligations of this contract.⁵¹ The same rule, it is believed, should apply in case these franchises are granted to the municipality and exercised by it; but here arises a conflict between this contractual right to the franchises so granted and the undoubted power of the legislature to dissolve the corporation, and the subject becomes one of complication and difficulty. Suffice it to say for the present that the legislative control of such franchises as supply these public utilities is not absolute and unlimited.⁵² Limitations upon this power will be considered here-

⁴⁸ LAYTON v. NEW ORLEANS, 12 La. Ann. 515; GIRARD v. PHILADELPHIA, 7 Wall. (U. S.) 1, 19 L. Ed. 53; Smith v. Inge, 80 Ala. 283; 1 Dill. Mun. Corp. §§ 63-68; Elliott, Mun. Corp. § 2.

⁴⁹ As indicative of the lack of power of a municipality to grant a franchise, in Cain v. Wyoming, 104 Ill. App. 538, it was held that a city ordinance granting the privilege of constructing and operating a system of waterworks is a mere license. A franchise must be granted by the legislature; a municipal body cannot confer it.

⁵⁰ Trustees of Schools v. Tatman, 13 Ill. 28, 30; DARLINGTON v. MAYOR, 31 N. Y. 164, 88 Am. Dec. 248; HARTFORD BRIDGE CO. v. EAST HARTFORD, 16 Conn. 149.

⁵¹ DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

⁵² 1 Dill. Mun. Corp. § 68, note. The dissolution of the corpora-

after under the head of "Quasi Public Corporations."⁵³ It has been held with regard to similar franchises that the legislature has unqualified right of revocation; for example, a public corporation has no property right in a ferry franchise acquired under a legislative grant,⁵⁴ nor in a wharf franchise to maintain wharves and charge wharfage.⁵⁵ Such powers are held by the United States Supreme Court to be "merely administrative, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration."⁵⁶

CONTRACTS AND OBLIGATIONS.

67. The legislative power of the state over the contracts and obligations of municipalities is limited by the vested rights of third parties, and the prohibitions found in many of the state constitutions. Subject to these limitations, the state has control over the contracts and obligations of a municipality.

This power was illustrated in the matter of licensing of wharves and ferries hereinbefore referred to, wherein was shown that the municipality has no vested rights in these things, upon the theory, expressed in some of the cases, that in such matters the corporation may not acquire vested rights as

tion is the death of the trustee of the community for whose use and benefit the franchise was granted. The beneficiaries still survive, and the public trust continues. The state as sovereign may and will see that the trust does not fail for want of a trustee, but will appoint a successor to hold and administer the trust for the welfare of the community.

⁵³ Post, § 189.

⁵⁴ *Hartford Bridge Co. v. East Hartford*, 18 Conn. 149; *EAST HARTFORD v. HARTFORD BRIDGE CO.*, 10 How. (U. S.) 511, 18 L. Ed. 518, 531.

⁵⁵ *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 28 L. Ed. 1015.

⁵⁶ *Id.*

against its creator;⁵⁷ but practically its right to acquire a right in property has been recognized, as we shall see hereafter. The following decisions may illustrate the judicial opinion upon these subjects: Parties who have become creditors of a municipal corporation upon the faith of the taxing power granted to it to meet its obligations may enforce the execution of this power by the appropriate process.⁵⁸ The taxing statute is thus held to be a part of the contract whose obligation cannot be impaired; but the mode of taxation may be altered if the change does not materially affect the creditors' security.⁵⁹ So, too, certain property may be made exempt from, which was originally subject to, taxation.⁶⁰ But where credit has been given to a municipality upon the faith of a statutory provision that no further bonded indebtedness shall be contracted by the city, an injunction has been granted to restrain an increase of bonded indebtedness, upon the ground that it would impair the obligations of a contract.⁶¹ So, also, creditors may acquire a vested right in a sinking fund provided for their security, so as to authorize them to call upon the courts to prevent any material change in its character, or diversion of it to

⁵⁷ *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 248; *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 180.

⁵⁸ *PORT OF MOBILE v. WATSON*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 17 L. Ed. 305; *State v. New Orleans*, 37 La. Ann. 13; *UNITED STATES v. NEW ORLEANS*, 103 U. S. 358, 26 L. Ed. 395; *VON HOFFMAN v. QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090; *Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

⁵⁹ *People v. Bond*, 10 Cal. 563; *Cooley*, Const. Lim. (6th Ed.) 347, 349.

⁶⁰ *Cooley*, Const. Lim. (6th Ed.) 348; *Selbert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 17 L. Ed. 305; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

⁶¹ *Smith v. Appleton*, 19 Wis. 468.

other uses, since the law had pledged it to them for their security.⁶²

OBLIGATIONS IMPOSED BY LEGISLATURE.

68. Upon the elementary principle that duty imposes obligation, the legislature has authority to impose upon the corporation without its consent, and even against its protest, such obligations as will enable it to perform its public functions.

It has accordingly been held that for such purpose a city may be compelled to pay a debt in excess of a legislative limit of indebtedness, to levy and collect taxes and appropriate them to the building and repair of highways, bridges, and canals, as being matters of public, as distinguished from municipal, concern;⁶³ also to expend money for the improvement of docks, wharves, and levees;⁶⁴ also to collect and appropriate money for the support of public schools of the city,⁶⁵ and even to provide for the distribution of money raised by taxation for school purposes after its collection;⁶⁶ also to compel the payment by a public corporation of a just debt not enforceable in law or equity;⁶⁷ and in a leading case the Su-

⁶² *Board of Liquidators of City Debts v. Municipality No. 1*, 6 La. Ann. 21; *KELLY v. MINNEAPOLIS*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; *People v. Bond*, 10 Cal. 563.

⁶³ *THOMAS v. LELAND*, 24 Wend. (N. Y.) 65; *People v. Board*, 50 Cal. 561; *Jensen v. Board*, 47 Wis. 298, 2 N. W. 320; *People v. Flagg*, 46 N. Y. 401. In one case this duty was enforced by mandamus at the instance of a private person not showing either interest or injury. *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446.

⁶⁴ *Eastern & A. R. Co. v. Railroad Co.*, 52 N. J. Law, 267, 19 Atl. 722.

⁶⁵ *State v. Blue*, 122 Ind. 600, 23 N. E. 963; *State v. Haworth*, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240.

⁶⁶ *State Board of Education v. Aberdeen*, 56 Miss. 518; *School Dist. No. 1 v. Weber*, 75 Mo. 558.

⁶⁷ *Creighton v. Board*, 42 Cal. 446; *Vasser v. George*, 47 Miss.

preme Court of New York has carried this doctrine to the extent of sustaining a statute passed levying a tax upon the property of a corporation, and appropriating the same to the payment of a private demand against the town, which had been expressly rejected by the voters of the town at an election held under legislative authority for that purpose, and intended as a settlement of the right.⁶⁸ Judge Cooley says this authority may be defended upon the ground that it is the duty of the state to enforce just obligations for the public benefit which have been incurred in the exercise of public power conferred upon a corporation.⁶⁹ But it is equally well settled by repeated decisions that it rests with the inhabitants of a municipality to determine conclusively whether a debt shall be incurred for purely municipal purposes;⁷⁰ also that a corporation cannot be compelled to become a stockholder in a railway company, or other private corporation;⁷¹ and in the celebrated Detroit Park Case it was ruled that a public park was a matter of municipal concern, and that the levy of a tax for the purchase and improvement of such parks could not be

713; *TOWN OF GUILFORD v. CORNELL*, 18 Barb. (N. Y.) 615; *Hasbrouck v. Milwaukee*, 21 Wis. 219; *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 644, 24 L. Ed. 521; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Supervisors*, 70 N. Y. 228; *Lycoming County v. Union County*, 15 Pa. 166, 53 Am. Dec. 575; *State v. Hampton*, 13 Nev. 441. The following cases declare the right of the municipality to a trial in due course of law: *Plimpton v. Somerset*, 33 Vt. 283; *Sanborn v. Commissioners*, 9 Minn. 273 (Gil. 258); *State v. Tuppan*, 29 Wis. 664, 9 Am. Rep. 622. See, also, *Cooley, Tax'n*, 687.

⁶⁸ *TOWN OF GUILFORD v. CORNELL*, 18 Barb. 615. See, also, *Carter v. Bridge Proprietors*, 104 Mass. 236; *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 654, 24 L. Ed. 521; *United States v. Railroad Co.*, 17 Wall. (U. S.) 322, 21 L. Ed. 597; *People v. Burr*, 13 Cal. 343; *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 141.

⁶⁹ *Cooley, Tax'n* (2d Ed.) 685.

⁷⁰ *People v. Harper*, 91 Ill. 357; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202; *Atkins v. Randolph*, 31 Vt. 226.

⁷¹ *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480.

enforced by the legislature without the consent of the municipality.⁷³ The only exception to this wholesome doctrine is to be found in the state of Pennsylvania, wherein, under direct legislative act sustained by the courts, the people of Philadelphia were unwillingly compelled to pay hundreds of thousands of dollars annually for the erection of the city hall "upon a scale of magnificence better suited for the capital of an empire than the municipal buildings of a debt-burdened city."⁷⁴ The same act which declared that the city must have these fine buildings appointed certain citizens a body of commissioners for their erection, and made this body self-perpetuating, and authorized it to make contracts for the construction of the buildings, and to make requisitions on the common council for the expenses thereof, the citizens of Philadelphia having no vote or voice whatever as to the subject.⁷⁴ This, of course, could only be defended upon the idea that the city hall was not municipal, but governmental, property, over which the state had supreme control. Between Pennsylvania at one extreme and Michigan at the other, the other states stand in a middle position of greater safety, even if greater doubt, as to the administration of the law.

PROPERTY.

- 69. Public property held by a municipality for the benefit of the general public may be controlled and administered by the state as supreme trustee for the public; but property actually acquired by a municipal corporation in the course of administration, and held for the benefit of the municipality, is not subject to the absolute control of the legislature.**

⁷³ *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

⁷⁴ *PERKINS v. SLACK*, 86 Pa. 283.

⁷⁴ 1 Dill. Mun. Corp. 74a. The city hall which Pennsylvania thus forced her chief city to build has well been described as "surpassing in extent and grandeur the townhalls and cathedrals of the Middle Ages."

Here, again, the dual nature of a municipal corporation is disclosed, and difficulties arise in regard to paramount authority over municipal property, not in stating the principle, but in its practical application. Contentions inevitably arise over the question, What is strictly municipal property, and what is governmental property; or what property is held by the municipality for the benefit of the general public, and what for the local benefit? The adjudged cases do not point out any distinct line of separation for these two classes of property, and in the confusion of cases upon this subject it is not wise to attempt to formulate any definite rule of law whereby to distinguish them, other than that suggested in the text. In Michigan, where the right of local self-government is fully recognized and protected by constitutional provision, Judge Cooley says: "It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary vocations of life, by gift or by descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the law of the land."⁷⁵ It is hardly proper, in other states where home rule is not so highly favored, to speak of any municipal property as private property. It is, however, essentially trust property, the municipality being the trustee, and the people of the locality the cestuis que trustent of strictly municipal property.⁷⁶ Of this class of property Judge Dillon expresses the opinion: "That while the legislature has full power of legitimate regulation and control, it cannot deprive them (that is, in essence, the people of the locality at whose expense it has been acquired, or for whose benefit it was granted) of such property. It is in effect fastened with a trust for the incorporated municipality as long as the legislature suffers it to live, and for the benefit

⁷⁵ *City of Detroit v. Plank Road Co.*, 43 Mich. 147, 5 N. W. 275.

⁷⁶ *NICHOL v. NASHVILLE*, 9 Humph. (Tenn.) 252; *Small v. Danville*, 51 Me. 359; *Jones v. New Haven*, 34 Conn. 1; *Maxmillian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468; *Western College of Homoeopathic Medicine v. Cleveland*, 12 Ohio St. 375.

of the people of the locality if the corporate entity which represents their rights shall be dissolved."⁷⁷ In New York it was decided that certain real estate held by the city in fee simple absolute under ancient grant, upon which at great expense the city had constructed reservoirs, could not by legislative action be converted into a public park without compensation to the city.⁷⁸ Upon the dissolution of a municipal corporation, as we have seen, so much of its assets as are not stamped with the strictly public character will be taken possession of and administered for the benefit of creditors of the corporation by a receiver appointed by the legislature, or by the court of chancery.⁷⁹

PUBLIC THOROUGHFARES.

70. The legislature has general control over all streets, canals, rivers, and bridges, and other public thoroughfares, and may compel the municipality to make such expenditures thereon for their improvement as it deems best for the public welfare.

Public thoroughfares are, of course, matters of general as distinguished from local concern. The legislature, therefore, may prescribe what improvements thereon shall be made for the public convenience, and may require the corporation to pay the expense of particular improvements required by it.⁸⁰ The legislature may use the compulsory power of taxation, or even compel the issuance of bonds by a municipality, for the purpose of raising money to pay for the construction and maintenance of a bridge or a canal, or wharves or levees in the city

⁷⁷ 1 Dill. Mun. Corp. § 68a.

⁷⁸ *Webb v. Mayor*, 64 How. Prac. 10. See, also, *Terrett v. Taylor*, 9 Cranch (U. S.) 52, 3 L. Ed. 650; *PEOPLE v. INGERSOLL*, 58 N. Y. 1, 17 Am. Rep. 178; 2 Kent, Comm. 257.

⁷⁹ 1 Dill. Mun. Corp. § 170.

⁸⁰ *People v. Kerr*, 27 N. Y. 188; *Portland, & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *Daley v. St. Paul*, 7 Minn. 390 (Gil. 311).

limits.⁸¹ And in Massachusetts it has been held that the legislature may charge the cost of an authorized public improvement upon the municipal corporation chiefly benefited thereby.⁸² In Maryland and some other states, so important is this duty to maintain streets and highways that it may be enforced by mandamus at the suit of a private person without showing special interest or injury.⁸³ The municipality, however, is usually held to be subject to judicial supervision in the exercise of its discretionary power over streets.⁸⁴ The power of the legislature over streets is so great that it may, so far as the public is concerned, determine to what use they may be put, even to the authorization of a nuisance in them;⁸⁵ and in Pennsylvania the power of the legislature to authorize a turnpike gate to be established in a city street has been supported by judicial decision.⁸⁶ As a consequence of this, street railways are operated in every city of the country, some by horses and others by electricity. Usually, the legislature requires that the street railway companies shall obtain their franchise from the city;⁸⁷ but these franchises may be conferred by the legislature directly, without regard to corporate

⁸¹ *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *Guilder v. Otsego*, 20 Minn. 74 (Gil. 59); *THOMAS v. LELAND*, 24 Wend. (N. Y.) 65.

⁸² *Inhabitants of Norwich v. Commissioners*, 13 Pick. (Mass.) 60.

⁸³ *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446.

⁸⁴ *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Texarkana v. Leach*, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; *Douglass v. City Council*, 118 Ala. 599, 24 South. 745, 43 L. R. A. 376.

⁸⁵ *State v. Luce*, 9 Houst. (Del.) 396, 32 Atl. 1076; *Bedell v. Railroad Co.*, 44 N. Y. 367, 4 Am. Rep. 688; *Cleveland v. Railway Co.*, 42 Vt. 449; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; *State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5.

⁸⁶ *Stormfeltz v. Turnpike Co.*, 13 Pa. 555.

⁸⁷ *State ex rel. Laclede Gaslight Co. v. Murphy*, 180 Mo. 10, 31 S. W. 594, 31 L. R. A. 798.

authority.⁸⁸ In some states the concurrence of both legislature and city is required.⁸⁹ The legislature likewise possesses the power to locate streets, and may exercise it without municipal consent.⁹⁰ This, like other municipal powers, may be delegated to the municipality.⁹¹

The doctrines of this chapter are believed to have the support of the preponderance of judicial decision in the United States, and to be consistent with the fundamental principles of our government.

Classes of Powers, Franchises and Property.

The legislature is the supreme trustee for the people of all public powers, rights, and property. The municipality is the local general agent of the state for governmental purposes. It has powers, franchises, and property of two classes: (1) Those held and exercised for the welfare of the general public; (2) those held and exercised for the local benefit of the municipality and its inhabitants. The former are subject to the unlimited control of the legislature; the latter are not thus subject. But the state may administer these trusts and affairs through other agencies than said municipality for the benefit of the cestuis qui trustent.⁹²

⁸⁸ *People v. Kerr*, 27 N. Y. 188; *Dubach v. Railroad Co.*, 89 Mo. 483, 1 S. W. 86; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *City of Milwaukee v. Railroad Co.*, 7 Wis. 85.

⁸⁹ 2 Dill. Mun. Corp. § 701a, note.

⁹⁰ *Lennon v. New York*, 55 N. Y. 365; *Sinton v. Ashbury*, 41 Cal. 525.

⁹¹ 2 Dill. Mun. Corp. §§ 680, 727; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

⁹² *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 248; *State v. Railroad Co.*, 29 Fla. 590, 10 South. 590; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *City of Council Bluffs v. Railway Co.*, 45 Iowa, 358, 24 Am. Rep. 773; *People v. Kerr*, 27 N. Y. 188; *Daley v. St. Paul*, 7 Minn. 390 (Gil. 311); *CITY OF PHILADELPHIA v. FOX*, 64 Pa. 169.

CHAPTER X.

PROCEEDINGS AND ORDINANCES.

71. Meetings.
72. Corporate Records.
73. Ordinances.
74. Mode of Enactment.
75. Essentials of Valid Ordinance.
76. Fines and Penalties.
77. Procedure.

MEETINGS.

- 71. The corporate affairs of a municipality must be transacted at a corporate meeting of the members of the governing body, duly convened at the stated or notified time and place, a quorum being present, and a majority thereof expressly favoring the action taken.**

The corporate meeting in the American municipality is a meeting of the governing body established by law, usually consisting of aldermen or councilmen, and called the city council. In some states it is composed of two parts, like our Congress and legislatures, and called aldermen and councilmen, resembling senators and representatives. Meetings are of two kinds, stated or regular, and called or special; the stated meeting being fixed in time and place by charter, ordinance, or usage; the called meeting, one specially convened in emergency.¹

Notice.

Of a stated meeting every member has due notice by the statute, rule, or usage under which it is held;² but of the

¹ 1 Dill. Mun. Corp. § 285.

² *Fitzgerald v. Railway Co.*, 24 R. I. 201, 52 Atl. 887; *Willc. Mun. Corp.* § 59.

called meeting reasonable notice of the time and place is required to be given, if practicable, to every member of the governing body.³ If extraordinary business is to be transacted, then notice must also be given of its nature, but not so of ordinary municipal affairs.⁴ Actual presence of a member not protesting at a called meeting is equivalent to notice. All members must be present or notified to make a valid special meeting.⁵ The notice must be personally served,⁶ if practicable, upon every member of the governing body, excepting only those who are absent from the state or whose whereabouts is unknown.⁷ Unnotified members who are actually present may avoid the presumption of notification by protesting against the meeting for want of notice.⁸

Quorum.

A majority of the body constitute a quorum, unless it is otherwise provided by law.⁹ A quorum is competent to trans-

³ 1 Dill. Mun. Corp. § 286; *Lord v. Anoka*, 36 Minn. 176, 30 N. W. 550.

⁴ *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666; *Willc. Mun. Corp.* § 74; *Dill. Mun. Corp.* § 264.

⁵ In the sections above cited Judge Dillon gives the provisions of the English Municipal Corporations Act on the subject of meetings and notice. The original Reform Act of 1835 is a monument to the wisdom, patriotism, and legislative skill of the English Bar; and the Consolidation Act of 1882 is the common resort of legislators, judges, and authors as the fountain of modern municipal law. See *Moore v. Perry*, 119 Iowa, 423, 93 N. W. 510; *State v. Smith*, 22 Minn. 218; *Magneau v. Fremont*, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436; *Shaw v. Jones*, 7 Ohio Dec. 453, 4 Ohio N. P. 372; *Schofield v. Tampico*, 98 Ill. App. 324.

⁶ *Lord v. Anoka*, 36 Minn. 176, 30 N. W. 550; *PEOPLE v. BATCHELOR*, 22 N. Y. 128.

⁷ *City of Knoxville v. Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *State v. Kirk*, 46 Conn. 395; *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717.

⁸ *Lord v. Anoka*, 36 Minn. 176, 30 N. W. 550. Cf. *Mitchell County Sup'rs v. Horton*, 75 Iowa, 271, 39 N. W. 394.

⁹ *Heiskell v. Baltimore*, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308; *Barnert v. Paterson*, 48 N. J. Law, 395, 6 Atl. 15; *City of Benwood*

act corporate business,¹⁰ and a majority of such quorum is sufficient to take any lawful action, or make an election,¹¹ unless the law governing the corporation requires a greater number. Thus, if the body be composed of nine, then five make a lawful meeting and three of these may pass any ordinance or resolution, or commit the corporation to legal obligation.¹²

If the governing body is composed of two parts, these rules will apply to each separate part.

Mayor.

The executive head of the municipality is the mayor, who is generally also a member of the governing body, and presides over it *ex officio*.¹³ But in the larger cities his functions are purely executive,¹⁴ and the presiding officer is another person, either chosen by the members from their own number, or elected by the voters of the corporation to that special office.¹⁵ In those municipalities which are called by the name "borough," the executive head is called a burgess in Pennsylvania, and in Connecticut a warden. These correspond to the mayor

v. Railway Co., 53 W. Va. 465, 44 S. E. 271; *Williams v. Brace*, 5 Conn. 190. But where the council consists of six members, with the mayor as presiding officer, the mayor and three of the councilmen do not constitute a quorum, and their acts are void. *City of Somerset v. Banking Co.*, 109 Ky. 549, 60 S. W. 5, 22 Ky. Law Rep. 1129. See *State ex rel. City of Carthage v. Milling Co.*, 156 Mo. 620, 57 S. W. 1008.

¹⁰ *Mueller v. Egg Harbor*, 55 N. J. Law, 245, 26 Atl. 89; *Labour-dette v. Municipality*, 2 La. Ann. 527; *Hutchinson v. Belmar*, 61 N. J. Law, 443, 39 Atl. 643.

¹¹ *State v. Deliesseline*, 1 McCord (S. C.) 52; *Cadmus v. Farr*, 47 N. J. Law, 208. Some cases rule that assent of a majority will be presumed. See *Collopy v. Cloherty* (Ky.) 39 S. W. 431.

¹² But if the body consist of twelve councilmen, seven is a quorum, and four may pass an act. See *Wheeler v. Commonwealth*, 98 Ky. 59, 32 S. W. 259.

¹³ *Elliott, Mun. Corp.* § 255.

¹⁴ *Jacobs v. San Francisco*, 100 Cal. 121, 34 Pac. 630; *Cochran v. McCleary*, 22 Iowa, 75.

¹⁵ *State v. Kilchli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779.

of an ordinary municipality. These boroughs exist in three of the United States: Connecticut, Pennsylvania, and New Jersey, and formerly in Minnesota.

The mayor's functions are prescribed in the charter, and differ in various municipalities. In some of them, as the executive head of the corporation, he possesses the veto power,¹⁶ in others the appointing power, and yet in others both of these;¹⁷ in some, as the presiding officer, he has power to cast only the deciding vote in case of tie;¹⁸ in others his functions and duties are the same as those of any other member of the board.¹⁹ The old common-law rule that the mayor was an integral part of a municipal corporation, and his presence necessary to a valid corporate meeting, does not prevail in America.²⁰ When he is absent from the city his office may be supplied by a pro tem. election from among the members of

¹⁶ Elliott, *Mun. Corp.* § 208. A city cannot by ordinance confer a greater power upon its mayor than that given by charter. *Union Depot & R. Co. v. Smith*, 16 Colo. 361, 27 Pac. 329.

¹⁷ *People v. McAllister*, 10 Utah, 357, 37 Pac. 578; *People v. Leavy*, 47 App. Div. 97, 62 N. Y. Supp. 161. In many municipalities the appointments of officers are made on the nomination of the mayor and confirmation of the council. *O'Brien v. Thorogood*, 162 Mass. 598, 39 N. E. 287; *Bakely v. Nowrey*, 68 N. J. Law, 95, 52 Atl. 289; *Armstrong v. Whitehead*, 67 N. J. Law, 405, 51 Atl. 472; *Kip v. City of Buffalo*, 7 N. Y. Supp. 685; *O'Connor v. Walsh*, 83 App. Div. 179, 82 N. Y. Supp. 499.

¹⁸ *LAWRENCE v. INGERSOLL*, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 306, 19 Am. St. Rep. 370; *People v. Rector*, 48 Barb. (N. Y.) 608; *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405; *People v. Wright*, 30 Colo. 439, 71 Pac. 365; *Harris v. People* (Colo. App.) 70 Pac. 699; *People v. Bresler*, 171 N. Y. 302, 63 N. E. 1093; *Cate v. Martin*, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613; *City of Somerset v. Smith*, 105 Ky. 678, 49 S. W. 456; *State v. Yates*, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205; *Hecht v. Coale*, 93 Md. 692, 49 Atl. 660; *Bousquet v. State*, 78 Miss. 478, 29 South. 399; *Ott v. State*, 78 Miss. 487, 29 South. 520; *State v. Mott*, 111 Wis. 19, 86 N. W. 569.

¹⁹ 1 Dill. *Mun. Corp.* § 270.

²⁰ *Martindale v. Palmer*, 52 Ind. 411.

the board, and the person thus chosen mayor pro tem. has the powers and may perform the functions of the mayor for the time being.²¹

Adjourned Meeting.

A valid stated or called meeting has the implied corporate power to adjourn to a future day and then resume its business.²² This adjourned meeting is merely a continuation of the original meeting, and notice is not required for it.²³ At such meeting any business may be transacted which could properly have come before the board at the original meeting, and the mode of proceeding at such meeting is the same as that in the original meeting.²⁴

²¹ *Commonwealth v. Corcoran*, 9 Kulp (Pa.) 507. *People v. Blair*, 82 Ill. App. 570, where it was held that if the mayor is in the city, but is absent from the meeting, either by reason of illness, executive business in another part of the city, or by choice, the power of the council is confined to the appointment of a temporary president or chairman, who will possess the authority of presiding officer only, and not that of mayor.

As to appointment of a presiding officer pro tempore, see *Keith v. City of Covington*, 109 Ky. 781, 60 S. W. 709, 22 Ky. Law Rep. 1414. See, also, *People v. Brush*, 83 Hun, 613, 31 N. Y. Supp. 586; *Truman v. Board of Supervisors*, 110 Cal. 128, 42 Pac. 421; *Saleno v. City of Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367.

²² *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *PEOPLE v. BATCHELOR*, 22 N. Y. 128; *Warner v. Mower*, 11 Vt. 385.

²³ *State v. Smith*, 22 Minn. 218; *Chosen Freeholders of Hudson County v. State*, 24 N. J. Law, 718; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660. A meeting of a city council, at which less than a quorum was present, adjourned to a future day, at which time another adjournment was had. Held that, though the first adjournment was irregular because of the absence of a quorum, it would be presumed that a quorum was present at the second meeting, and that a regular adjournment was then had. *Moore v. Perry*, 119 Iowa, 423, 93 N. W. 510.

²⁴ *State v. Smith*, 22 Minn. 218; *Borough of Avoca v. Railway Co.*, 7 Kulp (Pa.) 470; *Magneau v. Fremont*, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436.

Mode of Proceeding.

When a corporate meeting is duly convened and organized, its mode of procedure, wherein not otherwise expressly prescribed by statute, charter, or by-law, is in accordance with the general rules governing parliamentary bodies in America.²⁵ The ayes and noes may be called upon any vote not taken by ballot;²⁶ the presence of a quorum is necessary at every vote of the council;²⁷ no measure can be carried except by affirmative vote of a majority of all present;²⁸ action taken may be rescinded at any time before the rights of third parties have vested thereunder;²⁹ the board may rely and take action upon reports of its committees without further investigation;³⁰ and generally such course of procedure may be fol-

²⁵ 1 Dill. Mun. Corp. § 288.

²⁶ Hicks v. Commissioners (N. J. Err. & App.) 55 Atl. 250.

²⁷ State v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; City of Oakland v. Carpentier, 13 Cal. 540; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Brown v. District of Columbia, 127 U. S. 579, 8 Sup. Ct. 1314, 32 L. Ed. 262; CITY OF BALTIMORE v. POULTNEY, 25 Md. 18; DEY v. JERSEY CITY, 19 N. J. Eq. 412; Ferguson v. Chittenden County, 6 Ark. 479; Rushville Gas Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; Barnert v. Mayor, 48 N. J. Law, 395, 6 Atl. 15; Helskell v. Baltimore, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

²⁸ Labourdette v. Municipality, 2 La. Ann. 527; 1 Dill. Mun. Corp. § 282; LAWRENCE v. INGERSOLL, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870; State v. Priester, 43 Minn. 373, 45 N. W. 712. A resolution of a city council, not adopted by a majority of the whole number of the council, as required by statute, is void. Cascaden v. Waterloo, 106 Iowa, 673, 77 N. W. 333.

²⁹ State v. Hoyt, 2 Or. 246; Reiff v. Conner, 10 Ark. 241; Sank v. Philadelphia, 4 Brewst. (Pa.) 133; State v. Foster, 7 N. J. Law, 101; State v. Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65.

³⁰ Dorey v. Boston, 146 Mass. 336, 15 N. E. 897; Main v. Ft. Smith, 49 Ark. 480, 5 S. W. 801; Bissell v. Jeffersonville, 24 How. (U. S.) 287, 16 L. Ed. 664; Salmon v. Haynes, 50 N. J. Law, 97, 11 Atl. 151. A municipal council has the absolute right to make and unmake its own committees by a majority vote. Dreyfus v. Longergan, 73 Mo. App. 336.

mayor, the time and place of the meetings, the quorum, and the other matters treated of in this section.⁴¹ In such cases these regulations by statute, charter, and ordinance are controlling; and whenever they are mandatory they must be pursued in order to give validity to the proceedings.⁴² The rules of procedure given in this section, therefore, apply only wherever and so far as the charter, laws, and ordinances are silent.

Functions Discretionary and Ministerial.

Moreover, it should also be remembered that corporate proceedings cannot be conducted by individual aldermen, nor even by the mayor.⁴³ There must be a meeting for deliberation, consultation, and corporate action.⁴⁴ Nor can any public powers or matters of discretion be delegated by the council to others.⁴⁵ They must perform in person the discretionary and

⁴¹ Ante, chapter 8.

⁴² *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *City of Terre Haute v. Lake*, 43 Ind. 480; *Paterson v. Barnet*, 46 N. J. Law, 62; *City of San Antonio v. Micklejohn*, 89 Tex. 79, 33 S. W. 735. Presumption in favor of legality and regularity of meeting. *Peterborough v. Lancaster*, 14 N. H. 382; *State v. Smith*, 22 Minn. 218.

⁴³ *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758; *Strong v. Dist. of Columbia*, 4 Mackey (D. C.) 242; *Day v. Green*, 4 Cush. (Mass.) 433; *City of East St. Louis v. Wehrung*, 50 Ill. 28.

⁴⁴ *Commonwealth v. Howard*, 149 Pa. 302, 24 Atl. 308; *City of Little Rock v. Board*, 42 Ark. 152; *Delchael v. Maine*, 81 Wis. 553, 51 N. W. 880; *People v. Stowell*, 9 Abb. N. C. (N. Y.) 456; *DEY v. JERSEY CITY*, 19 N. J. Eq. 412; *CITY OF BALTIMORE v. POULTNEY*, 25 Md. 18.

⁴⁵ *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159, 30 N. W. 450; *Hydes v. Joyes*, 4 Bush. (Ky.) 464, 96 Am. Dec. 311; *State v. Jersey City*, 25 N. J. Law, 309; *City of Indianapolis v. Coke Co.*, 66 Ind. 396; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *Johnston v. Macon*, 62 Ga. 645; *McCrowell v. Bristol*, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653. In *Whyte v. Nashville*, 2 Swan (Tenn.) 364, a case of sidewalk assessment, it was held that a municipal corporation cannot delegate powers conferred upon

public duties imposed upon them.⁴⁶ Purely ministerial and executive functions may be, often must be, committed to others for performance.⁴⁷

CORPORATE RECORDS.

72. **Minutes of the proceedings at a meeting of the council duly recorded in the books of the municipality are public records, and as such are competent evidence either for or against the corporation, as well as third parties, of the corporate acts and proceedings therein recorded.**

and to be exercised by it to a street committee. See *Tomlin v. Cape May*, 63 N. J. Law, 429, 44 Atl. 209.

⁴⁶ *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Perine Contracting & Paving Co. v. Pasadena*, 116 Cal. 6, 47 Pac. 777; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299; *Thompson v. Schermerhorn*, supra; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Naegle v. Centuria*, 81 Ill. App. 334; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776. But where special authority to delegate this power by the legislature is given, such delegation is valid. *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659. See, also, *Lord v. Oconto*, 47 Wis. 386, 2 N. W. 785; *Davis v. Read*, 65 N. Y. 566; *Ould v. Richmond*, 23 Grat. (Va.) 464, 14 Am. Rep. 139; *Phelps v. Mayor*, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626.

⁴⁷ *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666; *Bullitt County v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499, 32 L. Ed. 885; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 16 L. Ed. 664; *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659; *Damon v. Granby*, 2 Pick. (Mass.) 345; *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 458, where, power being expressly granted to "ordain by-laws relating to wharves," and a general authority to appoint necessary officers to carry by-laws into effect, an ordinance which appointed a superintendent of wharves, and empowered him to regulate the mooring of vessels, was held to be valid. See, also, *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Holland v. State*, 23 Fla. 123, 1 South. 521; *City of Alton v. Mulledy*, 21 Ill. 76; *State v. Hauser*, 63 Ind. 155; *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908; *Main v. Ft. Smith*, 49 Ark. 480, 5 S. W. 801; *Kramrath v. Albany*, 53 Hun, 206, 6 N. Y. Supp. 54; *Commonwealth v. Pittsburgh*, 14 Pa. 177; *Dorey v. Boston*, 146 Mass. 336, 15 N. E. 897; *City of Burlington v. Dennison*, 42 N. J. Law, 165.

The minute of council proceedings is usually kept in a record book provided for that purpose, and, having been kept by the clerk or recorder in memoranda during the meeting, is thereafter formally written upon the minute book, and, being read and approved at the ensuing meeting, is authenticated by the signature of the mayor; thereafter it cannot be changed except by the vote of the council.⁴⁸ In order to make the record conform to the books, the council, like a court of record, may at a subsequent meeting amend its record by a minute entry *nunc pro tunc*.⁴⁹ Such correction of minutes can only be made by the body which has transacted the business; a new council cannot amend the record of its predecessor.⁵⁰ These minutes thus recorded and authenticated, being made of public affairs, usually have the same probative force and character as other public records.⁵¹

Evidence Aliunde.

It has been ruled in many cases that this record is not exclusive, but that other competent evidence may be given of corporate proceedings.⁵² Such rulings are common in the New England states in regard to records of town meetings;⁵³

⁴⁸ 1 Dill. Mun. Corp. § 297. A failure of a city to comply with a charter provision that the ordinance shall be recorded does not render the ordinance void, the provision being merely directory. *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532.

⁴⁹ *Becker v. Henderson*, 100 Ky. 450, 38 S. W. 857; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219; *Pontiac v. Oxford*, 49 Mich. 60, 12 N. W. 914; *Mayhew v. Gay Head Dist.*, 13 Allen (Mass.) 129; *Commissioners' Court of Lowndes County v. Hearne*, 59 Ala. 371; *Ryder's Estate v. Alton*, 175 Ill. 94, 51 N. E. 821.

⁵⁰ *City of Covington v. Ludlow*, 1 Metc. (Ky.) 295; *Howeth v. Jersey City*, 30 N. J. Law, 93; *Graham v. Carondelet*, 33 Mo. 262.

⁵¹ *Ryder's Estate v. Alton*, 175 Ill. 94, 51 N. E. 821; *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 435; *City of Pittsburg v. Cluley*, 74 Pa. 262; *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399; *Taylor v. Henry*, 2 Pick. (Mass.) 403; *People v. Ihnken*, 129 Mich. 466, 89 N. W. 72.

⁵² *State v. Kennedy*, 69 Conn. 220, 37 Atl. 503; *City of Indianapolis v. Imberry*, 17 Ind. 175; *Darlington v. Commonwealth*, 41 Pa. 68.

⁵³ 1 Dill. Mun. Corp. §§ 294-296.

but these cases cannot be regarded as precedents for the municipal record because of the widely different modes of proceeding and the lack of means of corporate authentication.⁵⁴ The Supreme Court of the United States has ruled that the acts of a corporation may be proved otherwise than by its records or written documents, even though it was its duty to keep a fair and regular record of its proceedings.⁵⁵ The rights of creditors or of third parties are not to be prejudiced by the neglect of the council to keep proper minutes.⁵⁶ The acts and proceedings of the corporation may be proven by any competent evidence aliunde the record kept by it in cases where corporate obligation and liability are involved.⁵⁷ Rigid rules of evidence have often been relaxed on a showing that municipal records have been carelessly and imperfectly kept; and the decisions in regard to varying, altering, and amending such records are not uniform.⁵⁸

Inspection.

The right of members of a municipal corporation to inspect the corporate records has been strictly upheld by the courts, and fewer restrictions laid upon it than in case of private corporations.⁵⁹ Any inhabitant or taxpayer has been held entitled to inspect the record of the corporate proceedings, and to have a copy thereof on payment of the usual fee.⁶⁰ This right has also been extended to the other corporate records,

⁵⁴ Ante, § 29.

⁵⁵ *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

⁵⁶ *School Dist. No. 2 v. Clark*, 90 Mich. 435, 51 N. W. 529; *City of San Antonio v. Lewis*, 9 Tex. 69; *Bigelow v. Perth Amboy*, 25 N. J. Law, 297.

⁵⁷ *Hutchinson v. Pratt*, 11 Vt. 402; *Langsdale v. Bonton*, 12 Ind. 467. See *Barr v. New Brunswick*, 58 N. J. Law, 255, 33 Atl. 477.

⁵⁸ *Westerhaven v. Clive*, 5 Ohio, 136; *Athearn v. District*, 33 Iowa, 105; *Ross v. Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Trustees of Hazelgreen v. McNabb*, 23 Ky. Law Rep. 811, 64 S. W. 431.

⁵⁹ 1 Dill. Mun. Corp. § 303.

⁶⁰ *People v. Walker*, 9 Mich. 328.

such as treasurer's and comptroller's books of account, tax-books, and voting lists.⁶¹ Other persons also, having an interest under these proceedings or in these accounts, are likewise entitled to inspection and copy.⁶²

ORDINANCES.

73. An ordinance is a by-law of a municipality, enacted by the council or governing body as a local law prescribing a general and permanent rule for persons or things within the corporate boundaries.

"By-law" is the general term applicable to the self-adopted rules of all classes of corporations; "ordinance" is used to describe the self-governing rule of a municipality.⁶³ It is not so comprehensive as "regulation" and is more solemn and formal than "resolution."⁶⁴ "Ordinance" is a continuing regulation, while "resolution," though sometimes held to enact a law, is usually declared not to be the equivalent of an ordinance, but rather an act of a temporary character, not prescribing a permanent rule of government.⁶⁵ A resolution is the appropriate form of corporate action for the removal of an officer, the acceptance of a dedication, the levying of a tax for a specific purpose, the purchase of corporate property, the making of corporate contracts, and the ratification of acts of agents, and the like.⁶⁶ The authority of the legislature to delegate to

⁶¹ *People v. Cornell*, 47 Barb. (N. Y.) 329.

⁶² *Grant, Corporations*, § 311.

⁶³ *Commonwealth v. Turner*, 1 Cush. (Mass.) 493; *Citizens' Gas & Mining Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624.

⁶⁴ *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 10 Atl. 809.

⁶⁵ *Butler v. Passaic*, 44 N. J. Law, 171; *Merchants' Union Barb Wire Co. v. Railway Co.*, 70 Iowa, 105, 28 N. W. 494; *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815.

⁶⁶ *Egan v. Chicago*, 5 Ill. App. 70; *Indianapolis v. Imberry*, 17 Ind. 175; *Sower v. Philadelphia*, 35 Pa. 231; *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518;

a municipal corporation this power of local legislation as to public affairs affecting the municipality, though challenged often and in nearly all the states, has been uniformly upheld by the courts, and must be regarded as settled law.⁶⁷

MODE OF ENACTMENT.

74. Where the charter, or the general law, prescribes the procedure for the enactment of ordinances, it must be complied with, else the ordinance is void.

For example, if the law requires that the ordinance shall be read at three different meetings before final passage, such provision is mandatory and essential to a valid ordinance; but the reading may be at a special or adjourned meeting;⁶⁸ and in one case it was held that the statute was complied with by a reading at one meeting by title merely,⁶⁹ and in another it was ruled that a new council, on a single reading before it, may pass an ordinance twice read before its predecessor.⁷⁰ Where no mode is prescribed by law for enacting ordinances,

Cape Girardeau v. Fougeu, 30 Mo. App. 551; *Central R. Co. v. Elizabeth*, 35 N. J. Law, 359; *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573.

⁶⁷ *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756; *State v. Tryon*, 39 Conn. 183; *Mason v. Shawneetown*, 77 Ill. 533; *City of Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235; *State v. Hayes*, 61 N. H. 314; *Markle v. Town Council*, 14 Ohio, 586; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *Village of Gloversville v. Howell*, 70 N. Y. 287; *Batsel v. Blaine* (Tex. App.) 15 S. W. 283; *State v. Anderson*, 26 Fla. 240, 8 South. 1; *Trenton Horse R. Co. v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; *City of Indianapolis v. Gaslight Co.*, 66 Ind. 396; *Same v. Trust Co.*, 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. Rep. 183; *Perdue v. Ellis*, 18 Ga. 586; *Trigally v. Memphis*, 6 Cold. (Tenn.) 382; *Metcalf v. St. Louis*, 11 Mo. 103; *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670; *Village of St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731.

⁶⁸ *Cutcomp v. Utt*, 60 Iowa, 156, 4 N. W. 214.

⁶⁹ *Anderson v. Camden*, 58 N. J. Law, 515, 33 Atl. 846.

⁷⁰ *McGraw v. Whitson*, 69 Iowa, 348, 28 N. W. 632.

the council may prescribe the mode by its own rules of order, or by ordinance; or, lacking either of these regulations, it may proceed in accordance with parliamentary law.⁷¹

Form—Record—Veto.

An ordinance should have the form of legislation, but this is not essential to its validity.⁷² The appropriate form of an ordinance is, "Be it ordained by the common council," etc.; but acts of the common council are interpreted by the courts in accordance with their manifest purpose and subject-matter; wherefore, it has been held that a formal resolution was an ordinance, when it prescribed a permanent rule of action and was passed in the mode required for ordinances.⁷³ And so of any other action taken by the common council with due deliberation, expressing its legislative intention and authority. The ordinance must be duly recorded, and, if executive approval is required, must receive the formal indorsement of the mayor.⁷⁴ If, however, formal approval be not required, and

⁷¹ *Swindell v. State*, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; *Swift v. People*, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; *Butler v. Passaic*, 44 N. J. Law, 171; *First Municipality v. Cutting*, 4 La. Ann. 336; *Robinson v. Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625; *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543.

⁷² *Rumsey Mfg. Co. v. Schell City*, 21 Mo. App. 175. An ordaining or enacting clause is not essential to the validity of an ordinance, even though prescribed by the municipal charter. *Chicago & E. I. R. Co. v. Hines*, 82 Ill. App. 488.

⁷³ *City of Rockville v. Merchant*, 60 Mo. App. 365; *Town of Lisbon v. Clark*, 18 N. H. 234; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *City of Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Merchants' Union Barb Wire Co. v. Railway Co.*, 70 Iowa, 105, 28 N. W. 494; *Sower v. Philadelphia*, 35 Pa. 231; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *City of Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503; *Gleason v. Barnett*, 22 Ky. Law Rep. 1660, 61 S. W. 20.

⁷⁴ *City of Central v. Sears*, 2 Colo. 588; *Ladd v. East Portland*, 18 Or. 87, 22 Pac. 533; *Kepner v. Commonwealth*, 40 Pa. 124; *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417; *New York & N. E. R. Co. v. Waterbury*, 55 Conn. 19, 10 Atl. 162; *Whitney v. Port Huron*, 88

the mayor is given the veto power, his assent will be presumed from failure to veto within the time prescribed.⁷⁵ When an ordinance is vetoed, the council may reconsider it, but only once, and within a prescribed limit of time.⁷⁶ An ordinance passed over the veto requires no further act of the mayor.⁷⁷

Publication.

It is the general, and ought to be the universal, law that no ordinance shall take effect until duly published; but in some states the Draconian precedent seems to be recognized, and it has been held that provisions for publication were directory only.⁷⁸ The general doctrine, however, is that such provisions are mandatory, and in favor of personal right and liberty they

Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291; *Ashley v. Newark*, 25 N. J. Law, 399; *Padavano v. Fagan*, 66 N. J. Law, 167, 48 Atl. 998; *Landes v. State*, 160 Ind. 479, 67 N. E. 189; *City of Erie v. Bler*, 10 Pa. Super. Ct. 381.

⁷⁵ *Saleno v. Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; *State v. Henderson*, 38 Ohio St. 644; *Martindale v. Palmer*, 52 Ind. 411.

⁷⁶ *Peck v. Rochester* (Sup.) 3 N. Y. Supp. 873; *Sank v. Philadelphia*, 8 Phila. (Pa.) 118.

⁷⁷ *Ashton v. Rochester*, 60 Hun, 372, 14 N. Y. Supp. 855. But where a resolution was vetoed by the mayor and returned to the council, who altered it to meet one of the objections set out in the veto, and again passed it, the resolution as last passed could not become effective until again submitted to the mayor for his approval, since by the alteration it became a new resolution. *Padavano v. Fagan*, 66 N. J. Law, 167, 48 Atl. 998.

⁷⁸ *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450; *Barnett v. Newark*, 28 Ill. 62; *City of Napa v. Easterby*, 61 Cal. 509; *Id.*, 76 Cal. 222, 18 Pac. 253; *Meyer v. Fromm*, 108 Ind. 208, 9 N. E. 84; *Wain's Heirs v. Philadelphia*, 99 Pa. 330; *Higley v. Bunce*, 10 Conn. 567. But see *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451; *City of Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385; *Elmendorf v. Mayor*, 25 Wend. (N. Y.) 693; *Reed v. City of Louisville*, 22 Ky. Law Rep. 1636, 61 S. W. 11; *City of Central v. Sears*, 2 Colo. 588; *Rutgers College Athletic Ass'n v. New Brunswick*, 53 N. J. Law, 279, 26 Atl. 87; *Rumsey Mfg. Co. v. Schell City*, 21 Mo. App. 176; *Town of Stillwater v. Moor* (Okl.) 33 Pac. 1024.

are strictly construed; so that actual notice has been held not sufficient without publication.⁷⁹ The publication must be, of course, in the manner and to the extent prescribed in the statute.⁸⁰ If not particularly prescribed, then it may be by printing in newspapers, according to the American usage, or by posting in public places, according to the practice of Continental Europe. But the publication must be reasonably sufficient to convey information to the inhabitants of the corporation.⁸¹

ESSENTIALS OF VALID ORDINANCE.

75. An ordinance may be void not only for want of corporate power to enact it, or for the failure to observe the prescribed procedure essential to its validity, but also because it is contrary to certain well-established doctrines of the law in regard to such regulations, chief of which are that a municipal ordinance, in order to be valid—

- (a) Must not contravene constitution or statute.**
- (b) Must not be oppressive.**

⁷⁹ *National Bank of Commerce v. Greneda* (C. C.) 44 Fed. 262; *O'Hara v. Park River*, 1 N. D. 279, 47 N. W. 380. An ordinance requiring a municipal ordinance to be published for a stated time, with a notice of the time of its consideration, is mandatory. *Herman v. City of Oconto*, 100 Wis. 391, 76 N. W. 364.

⁸⁰ *Meyer v. Fromm*, 108 Ind. 208, 9 N. E. 84; *City of Napa v. Easterby*, 61 Cal. 509; *Id.*, 76 Cal. 222, 18 Pac. 253; *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. 450; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *Waln's Heirs v. Philadelphia*, 99 Pa. 330; *City of Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413; *De Loge v. New York Cent. & H. R. R. Co.*, 157 N. Y. 688, 51 N. E. 1090.

Publication of a city ordinance in an extra edition of a daily newspaper, and the distribution of 50 to 100 copies of such edition by parties interested in the ordinance, is not a publication in a newspaper of general circulation. *State v. Bridge Co.*, 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357.

⁸¹ *Kimble v. Peoria*, 140 Ill. 157, 29 N. E. 723. As to publication on Sunday, see *Mayor, etc., of Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

- (c) **Must be impartial, fair, and general.**
- (d) **Must not prohibit, but may regulate, trade.**
- (e) **Must not contravene common right.**
- (f) **Must be consistent with public policy.**
- (g) **Must not be unreasonable.**

The power of municipal legislation must, of course, be conferred by the state, and is usually found in the municipal charter. This has already received consideration,⁸² and it scarcely need be said that the municipality cannot extend or enlarge its charter powers by its own ordinances.⁸³ These acts must be within the express or implied powers of the corporation, and they must be enacted according to the legislative mandate, otherwise they will be void.⁸⁴ They may be good in part and bad in part, provided these parts are so distinctly separable that the good can stand alone.⁸⁵ So, too, they may be valid as to certain persons or things, and invalid as to others.⁸⁶

⁸² Ante, § 52.

⁸³ *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; *State v. Nashville*, 15 Lea (Tenn.) 697, 54 Am. Rep. 427; *Thompson v. Carroll*, 22 How. (U. S.) 422, 16 L. Ed. 387; *Commonwealth v. Roy*, 140 Mass. 432, 4 N. E. 814; *Mays v. Cincinnati*, 1 Ohio St. 268; *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

A charter is the organic law of the municipality, and an ordinance in conflict therewith is void. *Kemp v. Monett*, 95 Mo. App. 452, 69 S. W. 31.

⁸⁴ *Rau v. Little Rock*, 34 Ark. 303; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Mayor, etc., of City of Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *State v. Kantler*, 33 Minn. 69, 21 N. W. 856; *Pike v. Megoun*, 44 Mo. 491; *Anne Arundel County Com'rs v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Borough of Freeport v. Marks*, 59 Pa. 257; *Paine v. Boston*, 124 Mass. 486; *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508; *Baker v. State*, 27 Ind. 485; *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. 599.

⁸⁵ *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Clarke*,

⁸⁶ *Kettering v. Jacksonville*, 50 Ill. 39; *Ex parte Cowert*, 92 Ala. 94, 9 South. 225. See *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

Motives of Members.

The motives of councilmen in passing an ordinance have been held not to be the subject of judicial inquiry;⁸⁷ but it has also been held that an ordinance procured by fraud or bribery is invalid,⁸⁸ and Judge Dillon protests that it would be disastrous to apply to its full extent to municipal ordinances the rule as to general legislation forbidding inquiry into the motives of members of Congress and legislators, "for," says he, "municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others."⁸⁹

Special Authority.

When the legislature has granted authority to the corporation to pass a particular by-law, and the by-law is in pursuance of and within the limits of this authority, it is the same

54 Mo. 17, 14 Am. Rep. 471; *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; *State v. Hardy*, 7 Neb. 377; *Pennsylvania R. Co. v. Mayor*, 47 N. J. Law, 286; *Second Municipality of New Orleans v. Morgan*, 1 La. Ann. 111; *City of Belleville v. Railway Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Canova v. Williams*, 41 Fla. 509, 27 South. 30; *Ex parte Bizzell*, 112 Ala. 210, 21 South. 371.

Where one part of an ordinance is void, and another part valid, the void part cannot have the effect to render the whole ordinance void. *Imes v. Railroad Co.*, 105 Ill. App. 37. Where the invalid provisions of an ordinance can be eliminated without affecting the remainder, it will not be invalid in toto. *McNulty v. Toopf*, 25 Ky. Law Rep. 430, 75 S. W. 258. But where an ordinance is invalid in part, and such part is so commingled with the valid portion as to make separation impossible, it is fatally defective. *Town of Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761.

⁸⁷ *Buell v. Ball*, 20 Iowa, 282; *Wright v. Defrees*, 8 Ind. 298; *Borough of Freeport v. Marks*, 59 Pa. 253; *Cooley, Const. Lim.* pp. 186, 208; *Villavaso v. Barthelet*, 39 La. Ann. 247, 1 South. 599; *People v. Cregler*, 138 Ill. 401, 28 N. E. 812.

⁸⁸ *STATE v. COKE CO.*, 18 Ohio St. 262; *Davis v. Mayor*, 1 Duer (N. Y.) 451; *In re Frederick St.*, 12 Pa. Co. Ct. R. 577.

⁸⁹ 1 Dill. Mun. Corp. § 311.

as though the legislature had enacted the by-law, and the only objection tenable is such as would lie against the legislative act, to wit, its unconstitutionality. But, as we have seen in a previous chapter,⁹⁰ many by-laws are enacted under a general grant of power vesting large discretion in the municipal council, and sometimes by-laws are passed under the implied inherent power of a municipality to make by-laws.⁹¹ Under such conditions by-laws are often challenged as illegal because contrary to certain fixed rules of law, as illustrated in the following instances:

Contrary to Constitution or Statute.

Ordinances have been declared invalid which empower purchasers of land at a tax sale to call upon the police to put them into possession;⁹² which imposed a license upon towboats engaged in interstate commerce;⁹³ which required a cotton dealer to report to the police the names of all sellers of loose cotton, with the amount purchased by him;⁹⁴ which discriminate between resident and nonresident traders;⁹⁵ which dominated the bodies of dead animals to certain third parties.⁹⁶

⁹⁰ Ante, § 52.

⁹¹ *City of Mt. Pleasant v. Breeze*, 11 Iowa, 399; *State v. Webber*, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *McPherson v. Chebanse*, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857.

⁹² *Calhoun v. Fletcher*, 63 Ala. 574. It deprives a citizen of property without "due process of law."

⁹³ *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653; *Ex parte Holmquist* (Cal.) 27 Pac. 1099. It contravenes federal authority to "regulate commerce among the states."

⁹⁴ *Long v. Taxing Dist.*, 7 Lea (Tenn.) 134, 40 Am. Rep. 55. An unwarranted infringement on personal liberty.

⁹⁵ *Thompson v. Association*, 55 N. J. Law, 507, 26 Atl. 798; *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857. Denies to citizens of the United States the equal protection of the law.

⁹⁶ *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; *River Rendering Co. v. Behr*, 77 Mo. 91, 48 Am. Rep. 6. No "due process of law," nor "just compensation" for private property taken.

The foregoing ordinances were all declared repugnant to constitutional principles, and therefore void. So, likewise, an ordinance contravening any public statute would be void, unless it were specially authorized by statute so plain and unmistakable as to amount to a legislative repeal of the former statute thus contravened.⁹⁷

Must not be Oppressive.

The courts have not hesitated under this wholesome doctrine to invalidate mandatory ordinances which interfere with the ordinary liberty of the citizen, as, for example, an ordinance ordering the arrest, imprisonment, and punishment of a free negro found out of doors after 10 o'clock at night;⁹⁸ one punishing any person knowingly associating with persons having the reputation of being thieves and prostitutes;⁹⁹ so, one committing the right to erect and maintain a steam engine and boiler to the unbridled discretion of the mayor;¹⁰⁰ also one denying the use of water from the city waterworks to anyone who owed, or whose tenant owed, a bill for water supplied in a previous year, or to a different house;¹⁰¹ so, one committing to an arbitrary official discretion to allow or prohibit street parades;¹⁰² also one forbidding a licensed retailer of liquors to sell between the hours of 6 p. m. and 6 a. m.;¹⁰³ and like-

⁹⁷ STATE v. CLARKE, 54 Mo. 17, 14 Am. Rep. 471; Mark v. State, 97 N. Y. 572; In re Snell, 58 Vt. 207, 1 Atl. 566; Cross v. Morristown, 33 N. J. Law, 57.

⁹⁸ Mayor, etc., of City of Memphis v. Winfield, 8 Humph. (Tenn.) 707.

⁹⁹ City of St. Louis v. Fitz, 53 Mo. 582.

¹⁰⁰ Mayor, etc., of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239.

¹⁰¹ Dayton v. Quigley, 29 N. J. Eq. 77.

¹⁰² State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948; In re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 311. But see Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389; Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71.

¹⁰³ Ward v. Greenville, 8 Baxt. (Tenn.) 228, 35 Am. Rep. 700.

wise one forbidding such sale whenever any denomination of Christian people are holding divine services.¹⁰⁴

Must be Impartial, Fair, and General.

A regulation requiring certain water consumers to put in expensive meters under penalty of cutting off the water supply was held void for unwarranted discrimination;¹⁰⁵ so one requiring a certain individual named to do certain acts in respect to a building, and imposing a penalty for noncompliance, was held void;¹⁰⁶ as also one requiring particular individuals by name to construct local improvements in front of their lots;¹⁰⁷ so also one forbidding the repairing, altering, or rebuilding any frame building within fire limits, the cost of which should exceed three hundred dollars;¹⁰⁸ also one prohibiting dairies within certain designated limits without the consent of the city council.¹⁰⁹

Must not Prohibit, but may Regulate, Trade.

Under this rule an ordinance has been declared void which fixed one rate of license for selling goods which are within or in transit to the city, and another rate for goods which are not within or in transit to the city;¹¹⁰ so also one requiring municipal licenses from nonresidents driving interurban carriages or omnibuses into the city.¹¹¹ And it has been held in New Jersey that whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or

¹⁰⁴ *Gilham v. Wells*, 64 Ga. 192. See, also, *State v. Strauss*, 49 Md. 288.

¹⁰⁵ *Red Star Line S. S. Co. v. Jersey City*, 45 N. J. Law, 246.

¹⁰⁶ *First Municipality of New Orleans v. Blinneau*, 3 La. Ann. 688.

¹⁰⁷ *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

¹⁰⁸ *First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185.

¹⁰⁹ *STATE v. MAHNER*, 43 La. Ann. 496, 9 South. 480.

¹¹⁰ *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642.

¹¹¹ *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

the public, the municipality must show its authority under plain and specific legislative enactment.¹¹² It has also been held that an ordinance, which prohibits any person bringing secondhand clothing into a city or town, or exposing it for sale therein without proof of its noninfection, is an unwarranted interference with trade.¹¹³

Must not Contravene Common Right.

Ordinances to the following effect have been declared invalid as contravening common right: One imposing a license tax for selling lemonade and cake at a temporary stand on the sidewalk;¹¹⁴ one requiring a license fee of three hundred dollars from an auctioneer, two hundred dollars from butchers, and twenty dollars from a peddler;¹¹⁵ one forbidding hotel runners from going within twenty feet of a railroad train, though permitted to do so by the railroad company;¹¹⁶ and one forbidding the renting of private property to lewd women.¹¹⁷

Must be Consistent with Public Policy.

Where a statute prohibited incorporated towns from subjecting the stray animals of nonresidents to corporate ordinances, a by-law visiting a penalty on the nonresident owner was held void;¹¹⁸ and also, in the same state, the ordinance of a municipal corporation with charter power to pass all by-laws deemed necessary for health, cleanliness, etc., and with

¹¹² Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33.

¹¹³ Kosciusko v. Slomberg, 68 Miss. 469, 9 South. 297, 12 L. R. A. 528, 24 Am. St. Rep. 281.

¹¹⁴ Barling v. West, 29 Wis. 307, 9 Am. Rep. 576.

¹¹⁵ City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16), 90 Am. Dec. 278; City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; Town of State Center v. Barenstein, 66 Iowa, 249, 23 N. W. 652.

¹¹⁶ Napman v. People, 19 Mich. 352; City of Chillicothe v. Brown. 38 Mo. App. 609; Haynes v. Cape May, 52 N. J. Law, 180, 19 Atl. 176; State v. Robinson, 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339.

¹¹⁷ Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629.

¹¹⁸ Town of Marietta v. Fearing, 4 Ohio, 427.

power to abate nuisances, which restrained cattle from running at large, was held void as being in contravention of the general policy of the state to allow animals to run at large.¹¹⁹ And where the general statutes of the state abolished the system of hay inspection, and in lieu required the sellers of hay to prepare their hay for market in a particular manner under penalty for noncompliance, a city ordinance prohibiting the sale of pressed hay without inspection was declared void as in conflict with public policy.¹²⁰

Must not be Unreasonable.

This rule belongs to that class of rules whereby the judiciary have reserved to themselves the power of doing justice in hard cases, and under it more ordinances have been challenged and more decisions made than under all the preceding rules. The decisions concur that the reasonableness of an ordinance is matter for the court, and not for the jury;¹²¹ and this revives Selden's objection to equity that it was "a roguish thing, having no standard but the whim or notion of the Lord Chancellor"; and the "length of the Chancellor's foot was the measure of equity."¹²² But the rule has survived through many generations of lawyers and judges, and is held applicable to the by-laws of all classes of corporations. Under it the following ordinances have been declared to be unreasonable

¹¹⁹ *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465. Contra, *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201.

¹²⁰ *Mayor, etc., of City of New York v. Nichols*, 4 Hill (N. Y.) 209. Cf. *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493, and *Hoffman v. Jersey City*, 34 N. J. Law, 172.

¹²¹ *Evison v. Railway Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; *Merced County v. Fleming*, 111 Cal. 46, 43 Pac. 392; *State v. Fourcade*, 45 La. Ann. 717, 13 South. 187, 40 Am. St. Rep. 249; *State v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; *City of St. Louis v. Weber*, 44 Mo. 547; *Kneedler v. Norristown*, 100 Pa. 368, 45 Am. Rep. 384; *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462.

¹²² Bl. Comm. p. 433, note y.

and void: An ordinance exacting a license from peddlers in the discretion of the mayor;¹²³ one requiring the building of a sidewalk in an uninhabited portion of the city;¹²⁴ requiring all peddlers to pay a license fee of two hundred dollars per month;¹²⁵ requiring transients to pay two hundred and fifty dollars per month,¹²⁶ and so one requiring a license of ten dollars per day of an itinerant merchant; an ordinance forbidding the running of street cars during the winter months without vestibules;¹²⁷ also one prohibiting laundries except in brick or stone buildings;¹²⁸ one regulating the weight of baker's bread, prohibiting the sale of loaves weighing less than one and one-half pounds;¹²⁹ one forbidding the covering of packages of fruit with colored netting;¹³⁰ one forbidding to drive faster than an ordinary gait;¹³¹ an ordinance exempting from license required of milkmen a dealer having not more than two cows, and delivering by hand;¹³² also one

¹²³ *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652.

¹²⁴ *Corrigan v. Gage*, 68 Mo. 541.

¹²⁵ *City of Peoria v. Gugenheim*, 61 Ill. App. 374.

¹²⁶ *City of Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447.

¹²⁷ *City of Yonkers v. Yonkers R. Co.*, 51 App. Div. 271, 64 N. Y. Supp. 955.

¹²⁸ *City of Shreveport v. Robinson*, 51 La. Ann. 1314, 26 South. 277; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. Contra, *In re Yick Wo*, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12.

¹²⁹ *City of Buffalo v. Baking Co.*, 39 App. Div. 432, 57 N. Y. Supp. 347. Contra, *City of Mobile v. Yulle*, 3 Ala. 137, 36 Am. Dec. 441; *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Guillotte v. New Orleans*, 12 La. Ann. 432.

¹³⁰ *Frost v. Chicago*, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301.

¹³¹ *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

¹³² *Pierce v. Aurora*, 81 Ill. App. 670. So, under a city charter authorizing the council to exempt any person from the operation of any ordinance or municipal regulation, an ordinance requiring a license from all milk sellers, except those who sell less than twenty

requiring license of sojourning auctioneers only; ¹³³ one prohibiting any vehicle used to carry passengers or freight for hire from standing in front of any hotel except when actually engaged in receiving or discharging passengers or freight; ¹³⁴ also one requiring a street car company, under penalty of twenty-five dollars, to sprinkle its track; ¹³⁵ also one compelling the construction of a cement sidewalk in lieu of a substantial plankwalk; ¹³⁶ imposing a tax of fifty cents a pole on an electric company; ¹³⁷ an ordinance requiring a railway company with only one night train, passing at 8 o'clock, to keep an electric light at every street crossing from dark to dawn; ¹³⁸ one requiring railway companies to keep flagmen by day and red lanterns by night at ordinary street crossings where there was no unusual danger; ¹³⁹ one prohibiting the company from moving its cars across the street for the purpose of distributing them in its yards between the hours of 6 a. m. and 11 p. m.; ¹⁴⁰ one requiring a theater manager to pay a police officer two dollars per night for attendance at the the-

quarts a day, is invalid. *Gray v. Wilmington*, 2 Marv. (Del.) 257, 43 Atl. 95.

¹³³ *City of Carrollton v. Bazette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

¹³⁴ *Ex parte Battis*, 40 Tex. Cr. R. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. Rep. 708.

¹³⁵ *City of Chester v. Traction Co.*, 6 Del. Co. R. (Pa.) 397, 587, 40 Wkly. Notes Cas. (Pa.) 183. But see *State v. Railroad Co.*, 50 La. Ann. 1180, 24 South. 265, 56 L. R. A. 287. An ordinance requiring a street railway company to clean, between its tracks, streets occupied by it, was held not to violate the rule as to equality and uniformity of legislation. *City of Chicago v. Traction Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666.

¹³⁶ *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225.

¹³⁷ *City of Saginaw v. Light Co.*, 113 Mich. 660, 72 N. W. 6.

¹³⁸ *Cleveland, C., C. & St. L. Ry. Co. v. Connersville* (Ind.) 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418.

¹³⁹ *Toledo, W. & W. Ry. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

¹⁴⁰ *City of Birmingham v. Railway Co.*, 98 Ala. 134, 13 South. 141.

ater to preserve order;¹⁴¹ prohibiting any person from permitting drunkards or disorderly persons to assemble at his house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business.¹⁴² Besides the foregoing, many of the ordinances referred to in the previous paragraphs as contravening other rules were also declared to be unreasonable.

Reasonable and Valid.

On the contrary, ordinances impeached as unreasonable have been sustained as valid in the following instances: Forbidding the keeping of a livery stable in a certain locality;¹⁴³ shoddy or carpet cleaning in a particular neighborhood;¹⁴⁴ one requiring itinerant dealers to pay more license fee than regular merchants;¹⁴⁵ a license of peddlers exempting home producers;¹⁴⁶ an ordinance prohibiting a hotel porter from soliciting on the premises of railroad companies;¹⁴⁷ one limiting the speed of trains to five miles an hour and requiring bell ringing within the city limits;¹⁴⁸ one forbidding such amount of drum beating and horn blowing on the streets as to annoy citizens;¹⁴⁹ one requiring bicycle riders to ring a bell on approaching a crosswalk;¹⁵⁰ one establishing a hack stand;¹⁵¹ one requiring a passenger on a street car to use his transfer

¹⁴¹ *Waters v. Leach*, 3 Ark. 110.

¹⁴² *City of Grand Rapids v. Newton*, 111 Mich. 48, 69 N. W. 84, 35 L. R. A. 226, 66 Am. St. Rep. 387; *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606, 58 Am. St. Rep. 576.

¹⁴³ *City of Chicago v. Stratton*, 58 Ill. App. 539.

¹⁴⁴ *EX PARTE LACEY*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93.

¹⁴⁵ *Ex parte Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

¹⁴⁶ *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333.

¹⁴⁷ *City of Laddonia v. Poor*, 73 Mo. App. 465.

¹⁴⁸ *Washington Southern Ry. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834. See *White v. Railway Co.*, 44 Mo. App. 540; *Bluedorn v. Railway Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

¹⁴⁹ *In re Gribben*, 5 Okl. 379, 47 Pac. 1074.

¹⁵⁰ *City of Emporia v. Wagoner*, 6 Kan. App. 659, 49 Pac. 701.

¹⁵¹ *City Council of Montgomery v. Parker*, 114 Ala. 118, 21 South. 452, 62 Am. St. Rep. 95.

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within a time limit, and prohibiting him from selling or transferring the same;¹⁵² one requiring stages and other vehicles to keep off certain narrow and crowded streets;¹⁵³ one forbidding sellers of perishable fruits from keeping their vehicles on a public street more than twenty minutes at a stand on a public street between certain hours of the day;¹⁵⁴ one forbidding a hackney coach to stand within thirty feet of an entrance to a public building;¹⁵⁵ one requiring vehicles for hire to occupy designated stands.¹⁵⁶ So also an ordinance regulating the handling of trains in a city is valid which forbids trains from standing across a public street longer than two minutes;¹⁵⁷ or from stopping on a public street crossing except in case of emergency;¹⁵⁸ requiring flagmen at dangerous crossings;¹⁵⁹ forbidding strangers from getting on or off moving trains; also ordinances requiring street railway companies to make quarterly reports of the number of passengers carried;¹⁶⁰ requiring them to pave the streets through which their tracks run;¹⁶¹ to provide a driver and conductor on each car.¹⁶²

¹⁵² *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47.

¹⁵³ *COMMONWEALTH v. MULHALL*, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 563, 48 Am. Dec. 679.

¹⁵⁴ *Commonwealth v. Brooks*, 109 Mass. 355. And this applies to licensed peddlers. *Commonwealth v. Fenton*, 139 Mass. 195, 29 N. E. 653.

¹⁵⁵ *Commonwealth v. Robertson*, 5 Cush. (Mass.) 439.

¹⁵⁶ *Commonwealth v. Matthews*, 122 Mass. 60.

¹⁵⁷ *City of Birmingham v. Railway Co.*, 98 Ala. 134, 13 South. 141.

¹⁵⁸ *City of Duluth v. Mallett*, 43 Minn. 204, 45 N. W. 154.

¹⁵⁹ *Delaware, L. & W. R. Co. v. East Orange*, 41 N. J. Law, 127. *Contra*, *Ravenna v. Penna. Co.*, 45 Ohio St. 118, 12 N. E. 445. See *Pittsburgh, C., C. & St. L. R. Co. v. Crown Point (Ind.)* 45 N. E. 587, 35 L. R. A. 684.

¹⁶⁰ *Bearden v. Madison*, 73 Ga. 184; *St. Louis v. Railway Co.*, 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82.

¹⁶¹ *City of Philadelphia v. Railway Co.*, 7 Phila. (Pa.) 321.

¹⁶² *State v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A.

A city may likewise regulate markets by ordinance providing that huckster wagons shall not stand in the market place for more than twenty minutes during certain hours;¹⁶³ that fresh beef shall not be sold in less than quarters except between dawn and 9 o'clock a. m.;¹⁶⁴ that only licensed occupants of stalls shall offer meats for sale at retail.¹⁶⁵

Liquor Selling.

And, in regard to liquor selling, ordinances have been held valid which limit the licenses to one for each one thousand of population;¹⁶⁶ so of one which limits the district or precinct in which liquor may be sold;¹⁶⁷ which prohibits druggists from selling except from prescription;¹⁶⁸ which forbids license unless assented to by two-thirds of the freeholders within a radius of three miles,¹⁶⁹ or without the consent of the county officials;¹⁷⁰ so of one which requires closing of saloons at 9, 10, and 11 o'clock at night, respectively,¹⁷¹ and from 10:30 to 5:00 a. m.,¹⁷² and from midnight to 5:00 a. m.¹⁷³

Sanitary and Police.

So also ordinances have been sustained which require lot owners to clean the snow from the sidewalk;¹⁷⁴ that require

410; *SOUTH COVINGTON & C. ST. RY. CO. v. BERRY*, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161.

¹⁶³ *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Fenton*, 139 Mass. 195, 29 N. E. 653.

¹⁶⁴ *City of Bowling Green v. Carson*, 10 Bush (Ky.) 64.

¹⁶⁵ *CITY OF ST. LOUIS v. WEBER*, 44 Mo. 547.

¹⁶⁶ *Decie v. Brown*, 167 Mass. 290, 45 N. E. 765.

¹⁶⁷ *In re Wilson*, 32 Minn. 145, 19 N. W. 723; *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611.

¹⁶⁸ *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302.

¹⁶⁹ *Metcalf v. State*, 76 Ga. 308.

¹⁷⁰ *State v. Hellman*, 56 Conn. 190, 14 Atl. 806; *Wagner v. Town of Garrett*, 118 Ind. 114, 20 N. E. 706.

¹⁷¹ *Smith v. Knoxville*, 3 Head (Tenn.) 245; *Staates v. Washington*, 44 N. J. Law, 605, 43 Am. Rep. 402; *Decker v. Sergeant*, 125 Ind. 404, 25 N. E. 458.

¹⁷² *State v. Welch*, 36 Conn. 215.

¹⁷³ *Brighton v. Toronto*, 12 U. C. 433.

¹⁷⁴ *Goddard's Case*, 16 Pick. (Mass.) 504, 28 Am. Dec. 259. Contra,

restaurants to close at 10 o'clock at night;¹⁷⁵ that require keepers of hotels, restaurants, and boarding houses to report the names of lodgers or boarders, and pawnbrokers to report property received, and description of persons delivering the same,¹⁷⁶ and which prohibit them from purchasing the articles pawned.¹⁷⁷ Also ordinances requiring garbage to be removed in a closed vehicle labeled "Garbage";¹⁷⁸ and one requiring a lot owner to remove filth from a private way adjoining his land;¹⁷⁹ also one cutting off gas and water from consumers delinquent for 10 days.¹⁸⁰

Discordant Rulings.

It will be noted from the foregoing cases that the decisions are not harmonious on this topic. What is reasonable in one city is unreasonable in another; and what seems reasonable to one court appears unreasonable to another, the decisions varying no doubt in accordance with the character of the city, the usages of the locality, the civic and municipal standards of the population, and the temperament of the judges. Recent and present tendencies are obviously towards stricter regulation and stronger presumption of the reasonableness of ordinances.

Gridley v. Bloomington, 88 Ill. 554, 30 Am. Rep. 566; *City of Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. See, also, *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.

¹⁷⁵ *State v. Freeman*, 38 N. H. 428.

¹⁷⁶ *City of Topeka v. Boutwell*, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593; *Kansas City v. Garnier*, 57 Kan. 412, 46 Pac. 707. See *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472.

¹⁷⁷ *Kuhn v. Chicago*, 30 Ill. App. 203.

¹⁷⁸ *People v. Gordon*, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524.

¹⁷⁹ *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. 1146.

¹⁸⁰ *Commonwealth v. Philadelphia*, 132 Pa. 288, 19 Atl. 136.

FINES AND PENALTIES.

76. A penalty is an essential part of an ordinance, and a corporation having authority to enact an ordinance has the implied power to impose a fine as a penalty; but the power of imprisonment or forfeiture must be expressly conferred by the legislature upon the municipality.

This doctrine of the common law has been generally recognized and enforced by the courts in America, but further than this the decisions are not in harmony, except that the fine may be recovered by a civil action.¹⁸¹ The statutes of the various states are not uniform, and it is difficult to formulate any general rules in regard to the penalty of an ordinance.

Imprisonment and Forfeiture.

Whether imprisonment may be used as a means of coercing payment of a fine, whether labor may be imposed as part of the sentence, whether the costs stand upon the same basis with fines, are questions on which the courts do not agree; but there seems to be general concurrence in the view that imprisonment for nonpayment of a fine, though recovered in an action for debt, is not imprisonment for debt;¹⁸² and also that costs and fines stand upon the same basis.¹⁸³ It has likewise been generally held that the particular penalty imposed must be expressly authorized by the legislature or it will be void; and that consequently, under a statute authorizing fine or imprisonment, imprisonment could not be used to enforce pay-

¹⁸¹ *Coates v. Mayor*, 7 Cow. (N. Y.) 585; *Ewbanks v. President*, etc., 36 Ill. 178; *In re Jones*, 90 Mo. App. 318; *City of De Soto v. Brown*, 44 Mo. App. 148; *In re Miller*, 44 Mo. App. 125.

¹⁸² *Hardenbrook v. Ligonier*, 95 Ind. 70; *Caldwell v. State*, 55 Ala. 133; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 442; *In re Miller*, 44 Mo. App. 125.

¹⁸³ *Horr & B. Mun. Ord. § 203. Contra, State v. Cantieny*, 34 Minn. 1, 24 N. W. 458.

ment of a fine;¹⁸⁴ nor could forfeiture be adjudged as a penalty without due notice or process.¹⁸⁵ Some courts hold that a fine must be fixed in amount by the terms of the ordinance,¹⁸⁶ while others have sustained as valid an ordinance giving the court some measure of discretion.¹⁸⁷

PROCEDURE.

77. The nature and form of complaint, evidence, and trial for violation of municipal ordinances are so varied in the several states by constitutions, statutes, and decisions therein as to be regarded as matters of local rather than of general law, and therefore are not susceptible of general statement and treatment.

¹⁸⁴ *Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240. See *Ex parte Rosenheim*, 23 Pac. 372, 83 Cal. 390; *Ex parte Green*, 94 Cal. 887, 29 Pac. 783; *Ex parte Smith* (Cal.) 29 Pac. 785. Also *Lewis v. Forehand*, 117 Ga. 798, 45 S. E. 68.

¹⁸⁵ *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Ft. Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 589; *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 148; *Gosselink v. Campbell*, 4 Iowa, 296; *Moore v. State*, 11 Lea (Tenn.) 35; *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 201; *Hanacom v. Burmood*, 85 Neb. 504, 53 N. W. 371; *Spitler v. Young*, 63 Mo. 42; *Gilchrist v. Schmidling*, 12 Kan. 263; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Bowers v. Horen*, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513. That part of an ordinance which provides that a city street commissioner may sell a vessel or its loading, which, having been sunk in the channel of the river within the city's jurisdiction, is removed as an obstruction, is invalid as being in excess of the amount named in the act permitting the city to enforce its ordinances by fines and penalties, as it creates a forfeiture. *Coonley v. Albany*, 132 N. Y. 145, 30 N. E. 382.

¹⁸⁶ *State v. Worth*, 95 N. C. 615; *In re Frazee*, 63 Mich. 396, 80 N. W. 72, 6 Am. St. Rep. 310; *Slocum v. Ocean Grove*, 59 N. J. Law, 110, 35 Atl. 794; *Bowman v. St. John*, 43 Ill. 337. See, also, *Landis v. Vineland*, 54 N. J. Law, 75, 23 Atl. 357.

¹⁸⁷ *Atkins v. Phillips*, 26 Fla. 281, 8 South. 429, 10 L. R. A. 158; *Bills v. Goshen*, 117 Ind. 221, 20 N. E. 115, 8 L. R. A. 261; *Town of Huntsville v. Phelps*, 27 Ala. 55; *State v. Cainan*, 94 N. C. 880; *City of Keokuk v. Dressell*, 47 Iowa, 597; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497.

In some states these proceedings are regarded as civil, in others criminal, and in others they are mixed. Recent authors,¹⁸⁸ in a treatise oft-quoted with reference to the nature of this proceeding, have classified the states as follows: (1) Criminal: California,¹⁸⁹ Massachusetts,¹⁹⁰ Maine,¹⁹¹ Nebraska,¹⁹² New Hampshire.¹⁹³ (2) Civil: Colorado,¹⁹⁴ Georgia,¹⁹⁵ New Jersey,¹⁹⁶ Wisconsin,¹⁹⁷ Wyoming.¹⁹⁸ (3) In some cases criminal and others civil: Alabama,¹⁹⁹ Ohio,²⁰⁰ Kansas,²⁰¹ Tennessee.²⁰² (4) In the following states appears to be assumed a mesne position: Illinois,²⁰³ Indiana,²⁰⁴ Iowa,²⁰⁵ Michigan,²⁰⁶ Minnesota,²⁰⁷ Missouri,²⁰⁸ New York.²⁰⁹ In the first class formal complaint under oath is necessary, and any pleadings required must be formal and particular;²¹⁰ in the sec-

¹⁸⁸ Horr & B. Mun. Ord. § 170.

¹⁸⁹ *City of Santa Barbara v. Sherman*, 61 Cal. 57.

¹⁹⁰ *In re Goddard*, 16 Pick. 504, 28 Am. Dec. 259.

¹⁹¹ *O'Malia v. Wentworth*, 65 Me. 129.

¹⁹² *City of Brownville v. Cook*, 4 Neb. 101.

¹⁹³ *State v. Stearns*, 31 N. H. 106.

¹⁹⁴ *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516.¹

¹⁹⁵ *Williams v. City Council*, 4 Ga. 509; *Floyd v. Commissioners*, 14 Ga. 354, 58 Am. Dec. 559.

¹⁹⁶ *Brophy v. Perth Amboy*, 44 N. J. Law, 217.

¹⁹⁷ *City of Oshkosh v. Schwartz*, 55 Wis. 483, 13 N. W. 553.

¹⁹⁸ *Jenkins v. Cheyenne*, 1 Wyo. 287.

¹⁹⁹ *City of Mobile v. Jones*, 42 Ala. 630.

²⁰⁰ *Larney v. Cleveland*, 34 Ohio St. 599.

²⁰¹ *Nietzel v. Concordia*, 14 Kan. 446.

²⁰² *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173; *Town of Bristol v. Burrow*, 5 Lea, 128.

²⁰³ *Town of Lewiston v. Proctor*, 23 Ill. 533.

²⁰⁴ *Miller v. O'Relley*, 84 Ind. 168.

²⁰⁵ *City of Davenport v. Bird*, 34 Iowa. 524.

²⁰⁶ *Cooper v. People*, 41 Mich. 403, 2 N. W. 51.

²⁰⁷ *State v. Lee*, 29 Minn. 445, 13 N. W. 913.

²⁰⁸ *City of St. Louis v. Vert*, 84 Mo. 204.

* ²⁰⁹ *Wood v. Brooklyn*, 14 Barb. 425.

²¹⁰ *Campbell v. Thompson*, 16 Me. 117; *Kansas City v. Flanagan*, 69 Mo. 22.

ond class the liberty of civil procedure prevails; ²¹¹ in the third class the procedure is dependent upon the nature of the particular case; and in the fourth class, without specifying the degree of particularity, the courts declare that criminal rules need not be followed, but the proceeding is necessarily stricter than in civil cases. ²¹² Careful attention will disclose discord not only between the decisions of different states, but even in those of the same states, so as to unsettle the classification of those given above.

Jury Trial.

The much mooted question of trial by jury in these cases has been variously decided, the decisions generally concurring, however, in the doctrine that the proceeding is valid if the accused may obtain a jury trial on appeal without oppressive restrictions. ²¹³

Proof of Ordinance.

There is a general concurrence of decisions that the municipal courts will take judicial notice of all municipal ordinances, but that in other courts ordinances must be duly proven. ²¹⁴ Some of the cases have gone to the extent of holding that the original record must be produced, and due enactment of the ordinance proven therefrom; ²¹⁵ others hold that its due enactment will be presumed from its being recorded among the municipal ordinances, and that a certified copy is

²¹¹ *Keeler v. Milledge*, 24 N. J. Law, 142; *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414.

²¹² *Furhman v. Mayor*, 54 Ala. 263; *City of Goshen v. Croxton*, 34 Ind. 239; *City of Emporia v. Volmer*, 12 Kan. 622.

²¹³ *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516.

²¹⁴ *Shanfelter v. Mayor*, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648; *Munson v. Fenno*, 87 Ill. App. 655; *City of St. Louis v. Roche*, 128 Mo. 541, 81 S. W. 915; *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16.

²¹⁵ *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443; *City of Ottumwa v. Schaub*, 52 Iowa, 515, 8 N. W. 529; *City of Independence v. Trouville*, 15 Kan. 70; *Town of Tipton v. Norman*, 72 Mo. 380.

sufficient;²¹⁶ while others apply to municipal ordinances the rule of state laws, and hold that an ordinance may be proven by the production of a printed pamphlet or volume containing the same, purporting to be published by authority.²¹⁷

Courts—Jurisdiction.

When the charter or statute provides that a certain court shall have jurisdiction of violations of municipal ordinances, this jurisdiction is usually held exclusive.²¹⁸ Such jurisdiction is generally given to the municipal court, whether held by mayor, recorder, or police judge or justice, and the action or prosecution is usually brought in the name of the municipality;²¹⁹ but in some states it is brought in the name of the state.²²⁰ If no court is named as having jurisdiction, the ordinances are not thereby rendered nugatory, but the action may be brought in the court having general jurisdiction.

Twice in Jeopardy.

When the same act is made an offense both by statute and ordinance, it has been held that it is a breach of the constitutional provision against putting a citizen twice in jeopardy for the same act to prosecute and punish the offender under both laws, and that a conviction under either may be pleaded in bar of the prosecution under the other.²²¹ But the weight of authority is opposed to this holding, upon the rather specious

²¹⁶ *McChesney v. Chicago*, 159 Ill. 223, 42 N. E. 894; *Bailey v. State*, 30 Neb. 855, 47 N. W. 208.

²¹⁷ *Chicago & A. Ry. Co. v. Winters*, 65 Ill. App. 435; *Napman v. People*, 19 Mich. 352; *St. Louis v. Railroad Co.*, 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82; *City of Rutherford v. Swink*, 90 Tenn. 152, 16 S. W. 76; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370, 19 S. W. 1053.

²¹⁸ *Horr & B. Mun. Ord.* § 166.

²¹⁹ 1 Dill. Mun. Corp. §§ 427 (note 1), 429.

²²⁰ North Dakota; Washington.

²²¹ *State v. Cowan*, 29 Mo. 330; *City of Corvallis v. Carlile*, 10 Or. 139, 45 Am. Rep. 134; *State v. Welch*, 38 Conn. 215; *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. 559; *Slaughter v. People*, 2 Doug. (Mich.) 334; *State v. Keith*, 94 N. C. 933.

distinction that one prosecution is for the violation of the state law, and the other for breach of the municipal ordinance only, and only quasi criminal.²²²

Repeal.

An ordinance once duly enacted remains in force until repealed.²²³ The same vote is required to repeal as to enact.²²⁴ Repeal may be effected by implication as well as by expression.²²⁵ But here the same rules apply as to state statutes.²²⁶ The legislature may also repeal a municipal ordinance by express legislation or by necessary implication, the rule being that if the subsequent state statute, or a subsequent ordinance, is necessarily repugnant to the ordinance, and the intention to repeal is obvious, then the ordinance is thereby repealed.²²⁷

²²² *Town of Bloomfield v. Trimble*, 54 Iowa, 399, 6 N. W. 586, 37 Am. Rep. 212; *City of St. Louis v. Bentz*, 11 Mo. 61; *Hankins v. People*, 106 Ill. 628; *State v. Oleson*, 26 Minn. 507, 5 N. W. 959; *Blatchley v. Moser*, 15 Wend. (N. Y.) 215; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *McRea v. Mayor*, 59 Ga. 168, 27 Am. Rep. 390; *Riley v. Inhabitants*, 51 N. J. Law, 498, 18 Atl. 116, 5 L. R. A. 352; *City of Indianapolis v. Huegele*, 115 Ind. 581, 18 N. E. 172.

²²³ A valid city ordinance when passed never becomes obsolete, but remains in force until repealed by the corporation. *Shroder v. Lancaster* (Pa. 1875) 6 Lanc. Bar, 201; *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491.

²²⁴ 1 Dill. Mun. Corp. § 282; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *Robinson v. Baltimore*, 93 Md. 208, 49 Atl. 4. An ordinance cannot be repealed, amended, or suspended by a resolution. *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *Joliet v. Petty*, 96 Ill. App. 450.

²²⁵ *Staples v. Bridgeport*, 75 Conn. 509, 54 Atl. 194; *Joliet v. Petty*, *supra*; *Schmidt v. Lewis*, 63 N. J. Eq. 564, 52 Atl. 707; *Budd v. Railway Co.*, 63 N. J. Eq. 804, 52 Atl. 1130; *City of Grand Rapids v. Norman*, 110 Mich. 544, 68 N. W. 269; *Knight v. West Union*, 45 W. Va. 195, 32 S. E. 163; *Smyrk v. Sharp*, 82 Md. 97, 35 Atl. 411; *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461; *Van DerLeith v. State*, 60 N. J. Law, 46, 37 Atl. 436.

²²⁶ *Booth v. Carthage*, 67 Ill. 102; *City of Providence v. Railroad Co.*, 12 R. I. 473.

²²⁷ *Southport v. Ogden*, 23 Conn. 128; *Town of Marietta v. Fearling*, 4 Ohio, 427; *Horr & B. Mun. Ord.* §§ 60, 61.

CHAPTER XI

OFFICERS, AGENTS, AND EMPLOYEES.

- 78. Officers.
- 79. Officers, Governmental and Municipal,
- 80. Eligibility.
- 81. Appointment and Election.
- 82. Fiduciary Relations.
- 83. Officers De Facto.
- 84. Salary.
- 85. Title to Office.
- 86. Resignation.
- 87. Judicial Control.
- 88. Removal.
- 89. Personal Liability—Contracts.
- 90. Torts.
- 91. Reimbursement of Municipality for Loss.
- 92. Agents.
- 93. Employés.

OFFICERS.

- 78. A municipal officer is one who holds for a time a permanent municipal position of trust and responsibility, with definite municipal powers, duties, and privileges.**
- A municipal agent is one employed and intrusted by a municipality with discretionary power to represent it in dealings with third persons.**
- A municipal employé is one engaged in the service of the municipality.**

At common law an office was defined to be "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public or private."¹ But in America "public offices are created for the purpose of effecting the ends for which government has been

¹ 2 Bl. Comm. p. 36.

instituted, which are the common good, and not the profit, honor, or private interest of any man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare."³ Right they may have to fees and emoluments; but these are purely incidental to the office they hold, the controlling idea being not the right of the officers, but the welfare of the public whose servants they are.³ The office endures; the officer is temporary. His term is usually fixed by law, and for a certain period. The law also defines the scope of his powers, duties, and privileges, and thus endows him with a portion of the governmental authority.⁴ He is not master, but servant, of

³ Field, C. J., in *BROWN v. RUSSELL*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *Grieb v. Syracuse* (Sup.) 87 N. Y. Supp. 1083; *United States v. Addison*, 6 Wall. (U. S.) 291, 18 L. Ed. 919; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372; *Livandais v. Municipality No. 2*, 16 La. 509; *Burns v. New York*, 3 Hun (N. Y.) 212, 5 Thomp. & C. 371; *State v. Kilchli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; *Clark v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325; *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87; *Cooley*, Const. Lim. (6th Ed.) p. 331.

³ *Hendricks v. State*, 20 Tex. Civ. App. 178, 49 S. W. 705; *Grieb v. Syracuse* (Sup.) 87 N. Y. Supp. 1083; *Commonwealth v. Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *Bowers v. Bowers*, 26 Pa. 74, 67 Am. Dec. 398; *People v. Stratton*, 28 Cal. 382. In the absence of law, ordinance or express contract, he is not entitled to compensation. *Bosworth v. New Orleans*, 26 La. Ann. 494; *Haswell v. New York*, 9 Daly (N. Y.) 1, 81 N. Y. 255; *Blackburn v. Oklahoma City*, 1 Okl. 292, 31 Pac. 782, 33 Pac. 708.

⁴ *BROWN v. RUSSELL*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *Attorney General v. Drohan*, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301; *McCornick v. Thatcher*, 8 Utah, 294, 30 Pac. 1091, 17 L. R. A. 243; *Burns v. New York*, 3 Hun (N. Y.) 212; *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677; *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Sheboygan Co. v. Parker*, 8 Wall. (U. S.) 93, 18 L. Ed. 33; *Prather v. Lexington*, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585.

the law—the common sovereign of all. His duties may be ministerial only, though usually they call for the exercise of discretion within the limited scope of his powers. He is appointed or elected by the municipality to exercise its functions in dealing with the citizen. His position, therefore, is a place of high trust and responsibility, whether he be mayor or alderman, recorder, or police officer.

Agents.

An agent also holds a position of like trust, responsibility, and discretion. His relation is fiduciary, and he may contract with third persons in the name of the corporation, and in matters committed to him may create corporate obligations; but he is distinguished from an officer in the fact that his position is not permanent, but temporary, and for a special object.⁵ When the service is performed, the relation ceases; the agency begins and ends with the special business. The duration of the agency is indefinite, but it usually terminates with the completion of the special business committed to it. If the agency becomes permanent, it then is called an office.

Employees.

"Employé" is used to describe one occupying a permanent position and performing a continuing service, so that, just as in an office, when one person goes out of the place another goes in. But the duties and services are purely ministerial; the employé is not clothed with discretion, and has no power to represent or bind the employer.⁶ These general rules fur-

⁵ *Barnes v. Philadelphia*, 3 Phila. (Pa.) 409; *Egan v. St. Paul*, 57 Minn. 1, 58 N. W. 267; *City of Baltimore v. Eschbach*, 18 Md. 276; *Baldwin v. Logansport*, 78 Ind. 346; *Davis v. Philadelphia*, 3 Phila. (Pa.) 374; *Detroit Free Press Co. v. State Auditor*, 47 Mich. 135, 10 N. W. 171; *In re Newport Charter*, 14 R. I. 655; *Sanford v. Boyd*, 2 Cranch (C. C.) 79, Fed. Cas. No. 12,311; *Travelers' Ins. Co. v. Oswego*, 59 Fed. 58, 7 C. C. A. 669; *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. Ed. 830; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169.

⁶ *Fletcher v. Lowell*, 15 Gray (Mass.) 108; *Shanley v. Brooklyn*,

nish a guide for distinguishing various persons by which the corporation acts and operates, but it is not always easy to discriminate between them and determine just where each person belongs.

OFFICERS, GOVERNMENTAL AND MUNICIPAL.

79. The officers of a municipality corresponding to its powers are of two classes, governmental and municipal.

The difficulty of distinguishing between governmental and municipal functions, hereinbefore discussed,⁷ exists also as to the officers of the corporation. The police department and all its officers are generally held to be state officers, as distinguished from municipal;⁸ but cases in New York⁹ and Kentucky¹⁰ have ruled to the contrary. City comptrollers, treasurers, and auditors are obviously municipal officers.¹¹ So,

30 Hun (N. Y.) 396; *Trainor v. Board*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

⁷ Ante, § 64.

⁸ *Yaple v. Morgan*, 2 Ohio Cir. Ct. R. 406; *Perkins v. New Haven*, 53 Conn. 214, 1 Atl. 825; *Burch v. Hardwicke*, 80 Grat. (Va.) 24, 32 Am. Dec. 640; *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; *Kimball v. Boston*, 1 Allen (Mass.) 417; *State v. Seavey*, 22 Neb. 454, 35 N. W. 228; *Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Culver v. Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. R. 270; *Borough of Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771.

⁹ *Shanley v. Brooklyn*, 30 Hun, 396; *Mangam v. Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 705; *People v. Albertson*, 55 N. Y. 50.

¹⁰ *Speed v. Crawford*, 3 Metc. (Ky.) 207, where it was held that members of the police board were "officers for cities and towns," within the provision of Const. art. 6, par. 6.

¹¹ *Stevenson v. Bay City*, 26 Mich. 44; *People v. Neilson*, 48 How. Prac. (N. Y.) 454; *Rissing v. Ft. Wayne*, 137 Ind. 427, 37 N. E. 328; *City of Ballard v. Keane*, 13 Wash. 201, 43 Pac. 27; *Morse v. Lowell*, 7 Metc. (Mass.) 152; *State v. Brandt*, 41 Iowa, 593; *State v. Walton*, 62 Me. 106; *Jenkins v. Scranton*, 202 Pa. 267, 51 Atl. 994; *Brown v.*

likewise, the firemen and members of the fire department have been declared to be municipal rather than public.¹² Those officers engaged in the administration of justice, preservation of the public peace, and the like, are state officers, while those enforcing the municipal by-laws, and attending to the gas-works, waterworks, sewers, and other municipal agencies, are usually held to be municipal officers.¹³ The mayor has been held to be, in Missouri,¹⁴ a municipal officer, and in Michigan¹⁵ a state officer; but it is believed that the former accords with the general current of decisions, as it does with the reason of the law.¹⁶ He is the official head of the municipality, its chief executive officer, the president of the corporation, and specially identified with the local interests centering in the municipality.¹⁷

Turner, 70 N. C. 93; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120.

¹² *Miller v. Fire Co.*, 26 Ga. 678; *People v. Fire Department*, 14 Cal. 479; *People v. Pinckney*, 32 N. Y. 377. But see *Lowry v. Lexington*, 24 Ky. Law Rep. 516, 68 S. W. 1109.

¹³ *State v. Mulvihill*, 9 Ohio Dec. 450; *Commonwealth v. Grant*, 2 Woodw. Dec. (Pa.) 379; *State ex rel. Cameron v. Shannon*, 133 Mo. 139, 83 S. W. 1137; *PEOPLE v. DRAPER*, 15 N. Y. 543; *City of Chicago v. Wright*, 69 Ill. 326; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640; *United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

¹⁴ *Britton v. Steber*, 62 Mo. 370.

¹⁵ *Attorney General v. Detroit*, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

¹⁶ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *STATE v. DENNY*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *Speed v. Crawford*, 3 Metc. (Ky.) 207; *Goud v. Portland*, 96 Me. 125, 51 Atl. 820 (harbor master).

¹⁷ *People v. Gregg*, 59 Hun, 107, 13 N. Y. Supp. 114; *People v. Wood*, 4 Parker, Cr. R. (N. Y.) 144; *Elliott, Mun. Corp.* § 271. Under the Constitution the mayor is the chief executive officer of a city, and, as such, is authorized to supervise the other officers thereof in the execution of their duties. *Burch v. Hardwicke*, 23 Grat. (Va.) 51.

Aldermen.

In common parlance the aldermen or councilmen are spoken of as holding municipal offices, but this appellation finds little countenance in the law. These functionaries in a body constitute the legislative department of the municipality,¹⁸ and have no separate individual powers or functions.¹⁹ They resemble congressmen and legislators in the federal and state government, and these are seldom called officers. Yet in Rhode Island,²⁰ Connecticut,²¹ and Oregon,²² common councilmen have been held to be officers within the provisions of the Constitutions of those states, and in the two latter states they were held to be public officers.

Distinction Important.

This distinction between municipal and public officers has been considered important in Michigan,²³ Indiana,²⁴ and other states, in view of certain constitutional provisions reserving the right of local self-government to municipalities. In view of these provisions it was ruled in the two states named above that boards appointed by the legislature, and specially empowered to perform certain acts for the municipality, were not officers of the municipality, and could make no contracts binding upon it.²⁵

¹⁸ *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.) 106; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774.

¹⁹ *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758; *Dey v. Jersey City*, 19 N. J. Eq. 412; *CITY OF BALTIMORE v. POULTNEY*, 25 Md. 18.

²⁰ *In re Newport Charter*, 14 R. I. 655.

²¹ *Garvie v. Hartford*, 54 Conn. 440, 7 Atl. 723.

²² *David v. Water Committee*, 14 Or. 98, 12 Pac. 174. See, also, as to aldermen, *City of Council Bluffs v. Waterman*, 86 Iowa, 688, 53 N. W. 280.

²³ *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103.

²⁴ *STATE v. DENNY*, 118 Ind. 382, 440, 21 N. E. 252, 274, 4 L. R. A. 65, 79.

²⁵ *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

ELIGIBILITY.

80. Qualifications for holding municipal offices are usually prescribed by the Constitution and general statutes of the state, but are often expressed in the charter of the corporation.

When qualifications are fixed by the Constitution, the legislature cannot impose additional requirements either by charter or general law.²⁶ Neither can these be fixed by municipal ordinance,²⁷ nor can statutory qualifications be changed by ordinance.²⁸ Residence is generally a qualification;²⁹ but non-residents have been held eligible to municipal office when resi-

²⁶ *State v. Ruhe*, 24 Neb. 251, 52 Pac. 274; *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. The legislature cannot impose any general qualification which the Constitution does not require. *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

The Constitution of Oregon provides that electors shall be male citizens, and also that only electors shall be eligible to county offices. An act making women eligible to the office of superintendent of schools was held void, as violating the constitutional provision. *State v. Stevens*, 29 Or. 464, 44 Pac. 898. But see *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343; *Thomas v. Owens*, 4 Md. 189.

²⁷ *Barker v. People*, *supra*.

²⁸ The city council has no power to add to the qualifications of city attorney as prescribed by charter. *Commonwealth v. Willis*, 19 Ky. Law Rep. 962, 42 S. W. 1118. See, also, *Bowyer v. Camden*, 50 N. J. Law, 87, 11 Atl. 137.

²⁹ *Territory v. Smith*, 3 Minn. 240 (Gil. 164), 74 Am. Dec. 749; *State ex rel. Thomas v. Williams*, 99 Mo. 291, 12 S. W. 905; *People v. Platt*, 117 N. Y. 159, 22 N. E. 937; *State v. George*, 23 Fla. 585, 3 South. 81; *Jain v. Bossen*, 27 Colo. 423, 62 Pac. 194; *Dowty v. Pittwood*, 23 Mont. 113, 57 Pac. 727.

Sound public policy requires that those who represent the local units of government shall themselves be component parts of such units, and this purpose can only be truly served by requiring such representatives to be and remain actual residents of the units which they represent, in contradistinction from constructive residents. *People v. Ballhorn*, 100 Ill. App. 571.

dence is not prescribed by statute or charter.³⁰ Women, minors, and aliens are ineligible unless otherwise expressly provided by law.³¹ A property qualification may also be prescribed by law.³²

Eligibility at Date of Election and of Taking Office.

Whether a candidate must be eligible at the date of election, or only at the date of induction into office, has been much mooted, and has produced conflicting decisions. In Indiana,³³ Wisconsin,³⁴ Iowa,³⁵ and Kansas³⁶ it has been ruled that any person is eligible who can qualify himself to take and hold the office at the date of induction into it; and this is the rule with regard to members of Congress.³⁷ But the weight of

³⁰ *State v. Swearingen*, 12 Ga. 23; *Pettit v. Yewell*, 24 Ky. Law Rep. 565, 68 S. W. 1075; *Jones v. Mills*, 11 Ill. App. 350.

³¹ *State v. Stevens*, 29 Or. 464, 44 Pac. 898; *State v. George*, 23 Fla. 585, 3 South. 81; *BRADWELL v. ILLINOIS*, 16 Wall. (U. S.) 130, 21 L. Ed. 442; *In re Robinson*, 131 Mass. 376, 41 Am. Rep. 239. See, also, *State v. Streukens*, 60 Minn. 325, 62 N. W. 259; *State v. Van Beck*, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397. But in the absence of provision as to qualifications of a deputy county clerk, a minor was held eligible to hold the office. *Harkreader v. State*, 35 Tex. Cr. R. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

³² *Darrow v. People*, 8 Colo. 417, 8 Pac. 661. Where arrearages of taxes disqualifies, an alderman elect may render himself eligible by payment of the same before assuming office. *People v. Hamilton*, 24 Ill. App. 609.

³³ *Shuck v. State*, 136 Ind. 63, 35 N. E. 993; *Vogel v. State*, 107 Ind. 374, 8 N. E. 164.

³⁴ *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512, where an alien who had not declared his intention to become a United States citizen at time of election was held competent to hold the office, the disability having been removed before the term of office began.

³⁵ *State v. Van Beck*, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397.

³⁶ *Privett v. Bickford*, 26 Kan. 53, 40 Am. Rep. 301. See, also, as to Kentucky, *Kirkpatrick v. Brownfield*, 97 Ky. 558, 31 S. W. 137, 29 L. R. A. 703, 53 Am. St. Rep. 422.

³⁷ *McCrary, Elect.* § 311.

judicial decision favors the doctrine that the candidate must be eligible at the date of his election.³⁸

APPOINTMENT AND ELECTION.

81. The mode of selecting municipal officers is prescribed in the charter or the general law, and varies greatly in different states and in the several municipalities of the same state.

The mayor and members of the governing body are elected by the people;³⁹ but the treasurer, comptroller, marshal, attorney, and members of boards are chosen in some corporations by the people, and in others by the council.⁴⁰ Subordinate officers are generally chosen by the council or appointed by the mayor; but the power of appointment is not here, as in England, an inherent executive function.⁴¹ When, however,

³⁸ State ex rel. Attorney General v. Page, 140 Mo. 501, 41 S. W. 963; State ex rel. Deering v. Berkeley, 140 Mo. 184, 41 S. W. 732; People v. Leonard, 73 Cal. 230, 14 Pac. 853; Drew v. Rogers (Cal.) 34 Pac. 1081; State v. Williams, 99 Mo. 291, 12 S. W. 905; Hill v. Territory, 2 Wash. T. 147, 7 Pac. 63; State v. Moores, 52 Neb. 770, 73 N. W. 299; Carson v. McPhetridge, 15 Ind. 327; Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, 22 Am. St. Rep. 729.

³⁹ Elliott, Mun. Corp. § 259; City of Monroe v. Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345.

⁴⁰ STATE v. CURRY, 134 Ind. 133, 33 N. E. 685; Ball v. Fagg, 67 Mo. 481; State ex rel. Kane v. Johnson, 123 Mo. 43, 27 S. W. 399; Commonwealth v. Crogan, 7 Kulp (Pa.) 23; Sheridan v. Colvin, 78 Ill. 237; Greer v. Asheville, 114 N. C. 678, 19 S. E. 635; People v. Albertson, 55 N. Y. 50; Grant v. Alpena, 107 Mich. 335, 65 N. W. 230; Whipple v. Henderson, 13 Utah, 484, 45 Pac. 274; Armstrong v. Whitehead, 67 N. J. Law, 405, 51 Atl. 472. The legislature may by statute confer upon the Governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class. State v. Broatch (Neb.) 94 N. W. 1016.

⁴¹ Speed v. Detroit, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555; People v. Freeman, 80 Cal. 233, 22 Pac. 173,

this power of appointment is conferred upon him, confirmation by the common council is not necessary unless expressly required;⁴² but if required, it is essential to a valid appointment.⁴³ In elections by the common council the rule of majority obtains,⁴⁴ but in popular elections a plurality of votes is sufficient.⁴⁵

Condition Precedent.

Compliance with conditions precedent is essential to the lawful taking and holding of an office.⁴⁶ At common law a citizen was obliged to accept public office under penalty of indictment for refusal;⁴⁷ but in America public office is considered rather a distinction to be coveted than a burden to be borne. An office, however, must be accepted;⁴⁸ but formal acceptance is not necessary;⁴⁹ it may be implied from con-

13 Am. St. Rep. 122; *Fox v. McDonald*, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98.

⁴² *State v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

⁴³ *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743.

⁴⁴ *LAWRENCE v. INGERSOLL*, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870; *Wheeler v. Commonwealth*, 98 Ky. 59, 32 S. W. 259; *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *Cadmus v. Farr*, 47 N. J. Law, 208.

⁴⁵ *Price v. Baker*, 41 Ind. 572, 13 Am. Rep. 346; *Brown v. Blake*, 46 Conn. 549; *Gullick v. New*, 14 Ind. 93, 77 Am. Dec. 49. But see *State v. Wilmington*, 3 Har. (Del.) 294.

⁴⁶ *State v. Wadhams*, 64 Minn. 318, 67 N. W. 64; *State v. Eshelby*, 2 Ohio Cir. Ct. R. 468; *People v. McKinney*, 52 N. Y. 374; *Vaughan v. Johnson*, 77 Va. 300; *Johnson v. Mann*, 77 Va. 265.

⁴⁷ *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314.

⁴⁸ Yet the common law is still recognized in the following American cases: *City of Waycross v. Youmans*, 85 Ga. 708, 11 S. E. 865; *United States v. Wright*, 1 McLean, 509, Fed. Cas. No. 16,775; *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17; *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *London v. Headen*, 76 N. C. 72; *Haywood v. Wheeler*, 11 Johns. 432; *Edwards v. United States*, *supra*. See, also, *Cloutman v. Pike*, 7 N. H. 209.

⁴⁹ *Smith v. Moore*, 90 Ind. 294; *Coyne v. Rennie*, 97 Cal. 590, 32 Pac. 578.

duct.⁵⁰ Generally an oath of office, and oftentimes a bond, is a condition precedent to entering upon the duties thereof; and one cannot become an officer de jure until he has complied with these conditions.⁵¹ But it has been held that failure to comply does not ipso facto create a vacancy, nor work a forfeiture of the right,⁵² but that the officer may, after taking the office, comply with these conditions at any time before proceedings are instituted for his removal.⁵³

FIDUCIARY RELATIONS.

82. All officers of a municipal corporation, including aldermen, occupy a fiduciary relation towards the public, and must act solely with reference to the best interests of the community.

Like the Gospel, so the law declares that no man can serve two masters; therefore one who takes upon himself a public office must not use it for self-service.⁵⁴ In all matters affecting the public his knowledge and skill are devoted to it, and

⁵⁰ *Johnson v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *STATE EX REL. KUHLMAN v. ROST*, 47 La. Ann. 53, 16 South. 776; *Hartford Tp. v. Bennett*, 10 Ohio St. 441.

⁵¹ *People v. McKinney*, 52 N. Y. 374; *Thompson v. Nicholson*, 12 Rob. (La.) 326; *Davis v. Berger*, 54 Mich. 652, 20 N. W. 629; *Olney v. Pearce*, 1 R. I. 292; *Hayter v. Benner*, 67 N. J. Law, 359, 52 Atl. 351; *Town of Tumwater v. Hardt*, 28 Wash. 684, 69 Pac. 378, 92 Am. St. Rep. 901; *State ex rel. Hull v. Gray*, 91 Mo. App. 438. But failure to take the prescribed oath will not prevent his becoming an officer de facto. *Rosell v. Board*, 68 N. J. Law, 498, 53 Atl. 398.

⁵² *State v. Ruff*, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140; *State v. Kraft*, 20 Or. 28, 23 Pac. 663. *Contra*, *Vaughan v. Johnson*, 77 Va. 300.

⁵³ *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405; *Board of Knox County Com'rs v. Johnson*, 124 Ind. 145, 24 N. E. 148, 7 L. R. A. 684, 19 Am. St. Rep. 88; *Holt Co. v. Scott*, 53 Neb. 176, 73 N. W. 681, and cases cited.

⁵⁴ *Goodrich v. Waterville*, 88 Me. 39, 33 Atl. 659; 1 Dill. Mun. Corp. § 444.

may not be used to the detriment of the corporation.⁵⁵ So it has been held that if an officer, whose duty it is to select a lot for the use of the city, procure the purchase, though beforehand by an agent, and sell the same at an advanced price to the city, he must account to the city for the profit made thereby.⁵⁶ The agent also is liable if he participate knowingly in the transaction.⁵⁷ An officer may not contract with himself on behalf of the city, for it requires two to make a valid contract.⁵⁸ Nor can a member of a city board vote upon any contract with the city in which he is personally interested;⁵⁹ but it is generally ruled that holding a municipal office is no disqualification to contracting with a municipality, provided it is represented in the transaction by other officers.⁶⁰

⁵⁵ *Nunemacher v. Louisville*, 98 Ky. 334, 32 S. W. 1091.

⁵⁶ *Short v. Symmes*, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

⁵⁷ *Short v. Symmes*, *supra*.

⁵⁸ *City of Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Drake v. Elizabeth*, 69 N. J. Law, 190, 54 Atl. 248; *Santa Ana Water Co. v. San Buenaventura* (C. C.) 65 Fed. 323; *McElhinney v. Superior*, 32 Neb. 744, 49 N. W. 705; *Holderness v. Baker*, 44 N. H. 414; *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242.

⁵⁹ *Berlin Iron Bridge Co. v. San Antonio* (C. C.) 62 Fed. 882; *Foster v. Cape May*, 60 N. J. Law, 78, 36 Atl. 1089; *Jolly v. Railroad Co.*, 25 Pittsb. Leg. J. (Pa.) 259; 1 Dill. Mun. Corp. (6th Ed.) § 311.

⁶⁰ *McBride v. Grand Rapids*, 47 Mich. 286, 10 N. W. 353; *City of Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Board of Tippecanoe County Com'rs v. Mitchell*, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520; *United States v. Brindle*, 110 U. S. 688, 4 Sup. Ct. 180, 28 L. Ed. 286.

OFFICERS DE FACTO.

83. An officer de facto is one who, under claim of right or color of title, holds an office de jure, and performs the functions thereof with the acquiescence of the public.

A mere usurper or intruder is not an officer de facto.⁶¹ He lacks the color of title and the public reputation and acquiescence essential to a de facto officer. Nor can one be a de facto officer unless he is actually holding an office de jure.⁶² "Where no office legally exists, the pretended officer is merely an usurper, to whose acts no validity can be attached. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed, until in some regular mode prescribed by law their title is investigated and determined."⁶³ Their acts are therefore held valid on considerations of public policy and necessity, provided they are generally recognized by the public as

⁶¹ *Keeler v. City of New Bern*, 61 N. C. 505; *Town of Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

One assuming to perform the duties incident to a public office without attempting to qualify is without color of title and an usurper. *Creighton v. Commonwealth*, 83 Ky. 147, 4 Am. St. Rep. 143. See, also, *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; *Dabney v. Hudson*, 68 Miss. 292, 8 South. 545, 24 Am. St. Rep. 276.

⁶² *People v. Hecht*, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96; *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 532; *People v. Staton*, 73 N. C. 546, 21 Am. Rep. 479.

⁶³ *NORTON v. SHELBY COUNTY*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Town of Decorah v. Bullis*, 25 Iowa, 15; *People v. White*, 24 Wend. (N. Y.) 520; *Kirker v. Cincinnati*, 48 Ohio St. 507, 27 N. E. 898; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285; *Carleton v. People*, 10 Mich. 250; *Roche v. Jones*, 87 Va. 484, 12 S. E. 965.

holding the offices.⁶⁴ With regard to the constitutionality of the law under which an office is held, a distinction has been taken between the law creating the office and the one providing for the election. If the former is unconstitutional, there can be no de facto officer;⁶⁵ but there may be, if only the law providing for election to the office is declared unconstitutional.⁶⁶

SALARY.

84. The salary prescribed by law for the official services of a municipal officer is considered the full compensation for all such services rendered by him during his term of office, even though his duties be increased by emergency or by law during the term.

The compensation of public officers is governed entirely by charter or statute. It is under the control of the legislature, by which it may be increased or diminished.⁶⁷ Likewise the duties of the office may be made more or less onerous by legislation, or may be increased by emergency arising during the term.⁶⁸ The officer accepts the office in view of all these

⁶⁴ *Hawkins v. Jonesboro*, 63 Ga. 527; *State v. Gray*, 23 Neb. 385, 36 N. W. 377; *Roche v. Jones*, supra; *Dean v. Gleason*, 16 Wis. 1; *People v. Nostrand*, 46 N. Y. 375; *Cochran v. McCleary*, 22 Iowa, 75; *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; *State v. Pinkerman*, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653; *Koontz v. Hancock*, 64 Md. 134, 20 Atl. 1039; *State v. Lane*, 16 R. I. 620, 18 Atl. 1035; *Scoville v. Cleveland*, 1 Ohio St. 126; *Williams v. School Dist.*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Lockhart v. Troy*, 48 Ala. 579; *Haskell v. Dutton*, 65 Neb. 274, 91 N. W. 395.

⁶⁵ *NORTON v. SHELBY COUNTY*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

⁶⁶ *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *People v. Terry*, 108 N. Y. 1, 14 N. E. 815.

⁶⁷ *Green v. New York*, 8 Abb. Prac. (N. Y.) 25, 2 Hilt. (N. Y.) 203; *Love v. Jersey City*, 40 N. J. Law, 456; *Waldraven v. Memphis*, 4 Cold. (Tenn.) 431; *Gilbert v. Paducah*, 24 Ky. Law Rep. 1998, 72 S. W. 816; *Faulkner v. Sisson*, 183 Mass. 524, 67 N. E. 669.

⁶⁸ *City of Baltimore v. Ritchie*, 51 Md. 233; *Leveridge v. New York*, 5 N. Y. Super. Ct. 263; *Commissioners v. Murray*, 3 Watts

possible conditions, and impliedly undertakes to render whatever service may be required, either by law or by emergency during his official term, for such compensation as the legislature has provided or may provide during the term.⁶⁹ The legislature may or may not allow additional compensation for additional service imposed upon him. This he knows when he accepts the office, and he is bound to perform its duties for the salary affixed thereto.⁷⁰ He has no legal claim for additional compensation for additional service though the salary be confessedly inadequate.⁷¹ Nor is it competent for the

(Pa.) 348; *City of Covington v. Mayberry*, 9 Bush (Ky.) 304; *Board of Education v. Quick*, 99 N. Y. 138, 1 N. E. 533.

⁶⁹ *Gillmore v. Lewis*, 12 Ohio, 281; *Evans v. Trenton*, 24 N. J. Law, 766; *City of Detroit v. Redfield*, 19 Mich. 376; *Waterman v. New York*, 7 Daly (N. Y.) 489. It was held in *Albright v. County of Bedford*, 106 Pa. 582, that where an officer's compensation is fixed by statute he cannot recover extra compensation for expenses incurred in performing his duties, even though the custom has been for a long time that the corporation should bear them. But see *City of Ludlow v. Richie*, 25 Ky. Law Rep. 1581, 78 S. W. 199.

⁷⁰ *Sidway v. Commissioners*, 120 Ill. 496, 11 N. E. 852; *City of Covington v. Mayberry*, 9 Bush (Ky.) 304; *White v. Polk Co.*, 17 Iowa, 413; *City of Ludlow v. Richie*, *supra*. A salaried officer of a public corporation made claim for extra compensation on the ground that his official duties had been increased, new duties being added since the salary was fixed. It was held that he was not entitled to an increase. *People v. Supervisors*, 1 Hill (N. Y.) 362. But in special instances, as where the law has required an officer to perform services attended with trouble and expense, and clearly outside of his regular official duties, he may recover. *People v. Supervisors*, 12 Wend. (N. Y.) 257. See, also, *Huffman v. Greenwood Co.*, 23 Kan. 281 (as to services rendered by city and county attorneys, not required as part of their duties); *Goud v. Portland*, 96 Me. 125, 51 Atl. 820; *Finley v. Territory*, 12 Okl. 621, 73 Pac. 273.

⁷¹ *City of Poughkeepsie v. Wiltsie*, 36 Hun (N. Y.) 270; *Council Bluffs v. Waterman*, 86 Iowa, 688, 53 N. W. 289; *Coleman v. Elgin*, 45 Ill. App. 64; *City of Covington v. Mayberry*, 9 Bush (Ky.) 304; *Bartch v. Cutler*, 6 Utah, 409, 24 Pac. 526; *Gordon County Com'rs v. Harris*, 81 Ga. 719, 8 S. E. 427; *Stiffer v. Delaware*, 1 Ind. App. 368, 27 N. E. 641; *Beard v. Decatur*, 64 Tex. 7, 53 Am. Rep. 735; *Stockwell v.*

board to vote an increase of compensation for extra services;⁷² and it has been held that an alderman is indictable for misdemeanor who votes an increase of salary to himself when the statute forbids him to vote on any subject in which he is interested, even though he does not take the salary.⁷³ The law with regard to the salaries of de facto officers in municipal corporations is the same as in quasi corporations, as hereinbefore set forth.⁷⁴ Suffice it here to say that the salary belongs to the officer de jure, and an action cannot be maintained for it by the officer de facto.⁷⁵ The officer de jure may sue the corporation for his salary if it has not been paid to the officer de facto, even though the latter rendered the services.⁷⁶ The officer de jure may also recover from the officer

Genesee County, 56 Mich. 221, 23 N. W. 25; *In re Parsons*, 54 N. Y. Super. Ct. 451.

⁷² *Garvie v. Hartford*, 54 Conn. 440, 7 Atl. 723; *BUCK v. EUREKA*, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409; *Debolt v. Cincinnati Tp.*, 7 Ohio St. 237; *Preston v. Bacon*, 4 Conn. 471; *Heslep v. Sacramento*, 2 Cal. 580 (vote of \$10,000 to mayor, for meritorious services, held void); *Reif v. Paige*, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; *State v. Nashville*, 15 Lea (Tenn.) 697, 54 Am. Rep. 427. In *Cloonan v. Kingston*, 37 Misc. Rep. 322, 75 N. Y. Supp. 425, it was held that where the common council has power to fix the salary of the city attorney it may award him compensation for preparing a revision of the city charter, in excess of the amount of his salary. See *Board of Education of Lexington v. Moore*, 24 Ky. Law Rep. 1478, 71 S. W. 621.

⁷³ *State v. Van Auken*, 98 Iowa, 674, 68 N. W. 454; *Duty v. State*, 9 Ind. App. 595, 36 N. E. 665; *State v. Shea*, 106 Iowa, 735, 72 N. W. 360; *People v. Bogart*, 3 Parker, Cr. R. (N. Y.) 143.

⁷⁴ *Ante*, § 25, pp. 82-83. See, also, *Cutshaw v. Denver* (Colo. App.) 75 Pac. 22.

⁷⁵ *Jones v. Easton*, 4 Pa. Dist. R. 509; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168; *McCue v. Wapello Co.*, 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134; *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

⁷⁶ *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *State v. Eselby*, 2 Ohio Cir. Ct. R. 468; *Meehan v. Board*, 46 N. J. Law, 276, 50 Am. Rep. 421; *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488; *Meagher v. Storey County*, 5 Nev. 244.

de facto the amount of salary paid to him;⁷⁷ but he cannot enjoin such payment except upon recognized grounds of equity, such as insolvency.⁷⁸ Whether the officer de jure may recover from the municipality the salary already paid to the officer de facto is diversely ruled by the courts, some holding that he can,⁷⁹ others that he cannot.⁸⁰

Holding Over.

An officer elected or appointed for a definite term is entitled to remain in office until his successor is lawfully elected and qualified, unless otherwise provided;⁸¹ and this holding

⁷⁷ *Westberg v. Kansas City*, 64 Mo. 493; *Michel v. New Orleans*, 32 La. Ann. 1094; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; *Bier v. Gorrell*, 30 W. Va. 95, 8 S. E. 30, 8 Am. St. Rep. 17; *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Nichols v. MacLean*, 101 N. Y. 526, 5 N. E. 347, 64 Am. Rep. 730; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131.

⁷⁸ *Bruner v. Bryan*, 50 Ala. 523; *Field v. Commonwealth*, 32 Pa. 478; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Bowerbank v. Morris (C. C.) Wall. Sr.* 118, Fed. Cas. No. 1,726.

⁷⁹ *State ex rel. Cullen v. Carr*, 8 Mo. App. 6; *People v. Brennan*, 30 How. Prac. 417; *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; *STATE v. CARR*, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743; *City of Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; *Kendall v. Raybould*, 13 Utah, 226, 44 Pac. 1034; *STATE v. MILNE*, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 38 Am. St. Rep. 724.

⁸⁰ *Westberg v. Kansas City*, 64 Mo. 493; *Saline County Com'rs v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *STATE v. MILNE*, *supra*; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417; *Demarest v. New York*, 147 N. Y. 203, 41 N. E. 405; *State ex rel. Vail v. Clark*, 52 Mo. 508; *Scott v. Crump*, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478; *McDonald v. Newark*, 58 N. J. Law, 12, 32 Atl. 384; *State v. Eshelby*, 2 Ohio Cir. Ct. R. 468.

⁸¹ *City of Central v. Sears*, 2 Colo. 588; *State v. Bulkeley*, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657; *White v. New York*, 4 E. D. Smith, 563; *People v. Ferris*, 16 Hun (N. Y.) 219; *De Lacey v.*

over is not prevented by constitutional provision that "the general assembly shall not create any office the tenure of which shall be more than four years."⁸² The incumbent holds over whenever there is a failure to elect his successor,⁸³ unless such failure is due to his own official negligence, in which case he is forbidden to profit by his own wrong.⁸⁴ In the former case he is an officer de jure;⁸⁵ in the latter he can be at most only an officer de facto—better, *de son tort*.⁸⁶

TITLE TO OFFICE.

85. The title to an office cannot be tried or determined in a collateral proceeding, but only by direct contest.

This rule applies only to officers de facto, and will not prevent a party from showing that the alleged or pretended official action was taken by a mere usurper or intruder,⁸⁷ for in

Brooklyn (City Ct. Brook.) 12 N. Y. Supp. 540; *State v. Kearns*, 47 Ohio St. 566, 25 N. E. 1027; *State v. Wilson*, 12 Lea (Tenn.) 247; *City of Wheeling v. Black*, 25 W. Va. 266; *McMillin v. Richards*, 45 Neb. 786, 64 N. W. 242; *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; *People v. Herring*, 30 Colo. 445, 71 Pac. 413; *Territory v. Jacobs*, 12 Okl. 152, 70 Pac. 197; *Keen v. Featherston*, 29 Tex. Civ. App. 563, 69 S. W. 983; *Wright v. Jacobs*, 12 Okl. 138, 70 Pac. 193.

⁸² *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

⁸³ *State v. Wilson*, 12 Lea (Tenn.) 247; *In re Budlong*, 15 R. I. 332, 5 Atl. 77; *Lynch v. Lafand*, 44 Tenn. (4 Cold.) 96; *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203. De facto officers in possession of an office and discharging the duties were, as against persons having no right thereto, entitled to continue in office. *Elliott v. Burke*, 24 Ky. Law Rep. 292, 68 S. W. 445.

⁸⁴ *People v. Bartlett*, 6 Wend. (N. Y.) 422, *Venable v. Curd*, 2 Head (Tenn.) 584; *Lynch v. Lafand*, *supra*.

⁸⁵ *Hale v. Bischoff*, 53 Kan. 301, 36 Pac. 752; *State v. Wilson*, 12 Lea (Tenn.) 246; *City of Wheeling v. Black*, 25 W. Va. 266; *Johnson v. Mann*, 77 Va. 265; *People v. Ferris*, 16 Hun (N. Y.) 219; *Walker v. Ferrill*, 58 Ga. 512; *Brady v. Howe*, 50 Miss. 607.

⁸⁶ *Lynch v. Lafand*, 4 Cold. (Tenn.) 96.

⁸⁷ *United States v. Alexander* (D. C.) 46 Fed. 728.

such instance the action is void. The mode of procedure for trying title to an office is usually prescribed by statute,⁸⁸ and in such proceeding a judgment of amotion and induction is rendered. When an incumbent suffers unlawful removal by the board of aldermen, the proper remedy is certiorari;⁸⁹ and the question of title of one in possession is properly tested not by mandamus, but by quo warranto.⁹⁰ This proceeding results, however, in amotion, and does not give induction.⁹¹ In some states mandamus is used to try title.⁹²

RESIGNATION.

86. At common law both tender and acceptance were essential to effect the resignation of municipal officers; but this rule, though recognized still in some localities, is not generally regarded as the law in America.

The common-law doctrine was that, since public servants were necessary to execute the laws, an office was a burden to be borne by the citizen in the interest of the community,⁹³

⁸⁸ 1 Dill. Mun. Corp. §§ 202-205.

⁸⁹ State v. Jersey City, 54 N. J. Law, 310, 23 Atl. 666; People v. Nichols, 58 How. Prac. (N. Y.) 200; People v. Cooper, Id. 358.

⁹⁰ Simon v. Hoboken, 52 N. J. Law (23 Vroom) 367, 19 Atl. 259; State v. Dunn, Minor (Ala.) 46, 12 Am. Dec. 25; St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 355; State v. Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912; Board of Aldermen v. Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215; Bonner v. State, 7 Ga. 473; Brown v. Turner, 70 N. C. 93; People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769. See, also, State ex rel. Johnston v. Badger, 90 Mo. App. 183; Searing v. Clark (N. J. Sup.) 55 Atl. 690; Mindermann v. Tillyer, Id.

⁹¹ State v. Lane, 16 R. I. 620, 18 Atl. 1035; State v. Broatch (Neb.) 94 N. W. 1017.

⁹² LAWRENCE v. INGERSOLL, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870; Luce v. Board, 153 Mass. 108, 26 N. E. 419; Vanton v. Wilson, 4 Tex. 400. See State v. Kersten (Wis.) 95 N. W. 120.

⁹³ Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; Edwards v.

and therefore when chosen to it he must accept it, and could not resign it without consent of the appointing power.⁹⁴ This doctrine is still recognized in Virginia,⁹⁵ North Carolina,⁹⁶ Tennessee,⁹⁷ Kansas,⁹⁸ and perhaps some other states; but the contrary has been expressly ruled in Iowa, Ohio,⁹⁹ Nebraska,¹⁰⁰ California,¹⁰¹ and other states, and is more consonant with American habits of thought. However, it has been held by the federal courts¹⁰² and the courts of Texas¹⁰³ and Illinois¹⁰⁴ that, when the law provides that an incumbent shall hold office until his successor is elected and qualified, he is not relieved from the duties of his office even by the acceptance of his resignation, but must await the qualification of his successor. Written or record evidence is essential to an express resignation; but the acceptance may be manifested by a formal declaration or by the appointment of a successor.¹⁰⁵

United States, 108 U. S. 471, 26 L. Ed. 314; *Willc., Mun. Corp.* p. 129.

⁹⁴ 1 Dill. Mun. Corp. § 224.

⁹⁵ *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148.

⁹⁶ *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677.

⁹⁷ *Kain, Tennessee Officer*, § 2.

⁹⁸ *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418.

⁹⁹ *Reiter v. State*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681.

¹⁰⁰ *State v. Lincoln*, 4 Neb. 260.

¹⁰¹ *People v. Porter*, 6 Cal. 26; *Primm v. Carondelet*, 23 Mo. 22.

¹⁰² *Badger v. United States*, 93 U. S. 599, 23 L. Ed. 991; *United States v. Green* (C. C.) 53 Fed. 769.

¹⁰³ *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903; *Keen v. Featherston*, 29 Tex. Civ. App. 563, 69 S. W. 983; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

¹⁰⁴ *People v. Barnett Tp.*, 100 Ill. 332. See, also, *Fryer v. Norton*, 67 N. J. Law, 537, 52 Atl. 476; *Attorney General v. Marston*, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; note to *Reiter v. State*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681.

¹⁰⁵ *People v. Hanifan*, 6 Ill. App. 158; *Id.*, 96 Ill. 420; *Bath v. Reed*, 78 Me. 276, 4 Atl. 688; *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Reiter v. State*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681.

Implied.

Resignation of office may be implied as well as express. When residence is a qualification for a municipal office, an officer vacates his office by removing beyond the corporate limits.¹⁰⁶ So, likewise, when he accepts and assumes an incompatible office.¹⁰⁷ In both instances the original office instantly terminates without judicial proceedings, and the successor may be forthwith elected or appointed to fill the vacancy thus created.¹⁰⁸ But a bonded officer cannot discharge his obligation by resignation in either of the foregoing methods.¹⁰⁹ And an exception to the general rule is made in those jurisdictions where acceptance is held necessary to complete the resignation.¹¹⁰ Whether the new office is incompatible with the former one is a question to be decided by the courts; there must be either a statutory inhibition or an obvious inconsistency in the functions of the two offices.¹¹¹ Official notice of

¹⁰⁶ *People v. Hull*, 64 Hun (N. Y.) 638, 19 N. Y. Supp. 536; *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551; *Curry v. Stewart*, 8 Bush (Ky.) 560; *People v. Parker*, 3 Neb. 409, 19 Am. Rep. 634; *Commonwealth v. Lally*, 30 Leg. Int. (Pa.) 296.

¹⁰⁷ *People v. Murray*, 73 N. Y. 535; *O'Brien v. New York*, 84 Hun, 50, 32 N. Y. Supp. 34; *People v. Carrique*, 2 Hill (N. Y.) 93; *Mechem*, Pub. Off. § 421; 1 Dill. Mun. Corp. § 225.

¹⁰⁸ *Wilson v. King*, 3 Litt. (Ky.) 457, 14 Am. Dec. 84; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Edwards v. United States*, 108 U. S. 471, 26 L. Ed. 314; *Magle v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *People v. Hanifan*, 6 Ill. App. 158.

¹⁰⁹ *Attorney General v. Marston*, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; *City of Philadelphia v. Marcer*, 1 Leg. Gaz. R. (Pa.) 355.

¹¹⁰ *Mechem*, Pub. Off. § 421.

¹¹¹ *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Preston v. United States* (D. C.) 37 Fed. 417; *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *People v. Green*, 5 Daly, 254, Id., 58 N. Y. 295; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251.

The office of mayor is held to be incompatible with town clerk, 7 Com. Dig. tit. "Officer," B 6; retired army officer, *State v. De Gress*, 53 Tex. 387; prison commissioner, *Howard v. Shoemaker*, 35 Ind. 111. The office of alderman is held incompatible under

this implied resignation can be taken only by that government under which the first office is held; for example, when a congressman accepts the office and performs the duties of a state judge, he is a *de facto* judge, though he continues also to hold his seat in Congress.¹¹²

JUDICIAL CONTROL.

87. Municipal officers are subject to judicial control by mandamus, injunction, or motion to compel performance of judicial duties, observance of the law, and removal of unworthy officers.

The jurisdiction of courts in supervising official action is generally limited to ministerial duties.¹¹³ Courts will not substitute their judgment for that of public officers in whom discretion is vested;¹¹⁴ but this rule is limited by the restriction that "the discretion must be exercised within its proper limits for the purposes for which it is given, and from the motives by which alone those who gave the discretion intended that its exercise should be governed."¹¹⁵ And so, where power is given to a board of supervisors to fix water rates, the rate fixed must be reasonable and just, so as not to amount to a practical confiscation of the property of the water company, otherwise the courts will interfere.¹¹⁶ Likewise, where the

English law with that of county treasurer, town clerk, burgess, and city chamberlain. Throop, Pub. Off. § 35.

¹¹² Calloway v. Sturm, 1 Helsk. (Tenn.) 764; City of Nashville v. Thompson, 12 Lea (Tenn.) 348.

¹¹³ Ray v. Wilson, 29 Fla. 342, 10 South. 613, 14 L. R. A. 773; Commonwealth v. Henry, 49 Pa. 530; Hudmon v. Slaughter, 70 Ala. 546; City of Madison v. Smith, 83 Ind. 502.

¹¹⁴ 1 Dill. Mun. Corp. §§ 94, 95, 835-837; State v. Lincoln (Neb.) 94 N. W. 719; In re Mollneux (Sup.) 83 N. Y. Supp. 943.

¹¹⁵ People v. Sturtevant, 9 N. Y. (5 Seld.) 263, 59 Am. Dec. 536; Davis v. Mayor, 1 Duer (N. Y.) 451.

¹¹⁶ SPRING VALLEY WATERWORKS v. SAN FRANCISCO, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

board of aldermen is made the sole judge of the qualification, election, and return of its own members, it must observe the limits of its jurisdiction and exercise its power regularly, or the courts will supervise the same by certiorari.¹¹⁷ If, however, any officer refuses to perform a mandatory duty, its performance will be enforced by mandamus,¹¹⁸ for contempt of which the officer may be punished.¹¹⁹ Nor can he escape this penalty by resignation after service of the process.¹²⁰ So, also, officers may be enjoined from illegal acts threatened under color of their official position.¹²¹ Here, too, the courts

¹¹⁷ *State v. Common Council*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; *Echols v. State*, 56 Ala. 131; *State ex rel. Turner v. Fitzgerald*, 44 Mo. 425; *Commonwealth v. Allen*, 70 Pa. 465; *State v. Gates*, 35 Minn. 385, 28 N. W. 927. But see *Keating v. Stack*, 116 Ill. 191, 5 N. E. 541.

¹¹⁸ *United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *United States v. Lawrence*, 3 Dall. (U. S.) 42, 1 L. Ed. 502; *Kennedy v. Washington*, 3 Cranch, C. C. 595, Fed. Cas. No. 7,708; *Coy v. Lyons*, 17 Iowa, 1, 85 Am. Dec. 539; *City of Memphis v. Brown*, 97 U. S. 300, 24 L. Ed. 924; *Mayor, etc., of City of New Orleans v. Morgan*, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232; *Brander v. Justices*, 5 Call (Va.) 548, 2 Am. Dec. 606.

Mandamus will lie to compel the performance of purely ministerial duties incumbent on an officer by virtue of his office, and concerning which he possesses no discretionary powers. *Warmolts v. Keegan* (N. J. Sup.) 54 Atl. 813. See *State ex rel. Clement v. Stokes*, 99 Mo. App. 236, 73 S. W. 254; *People v. Marlett* (Sup.) 83 N. Y. Supp. 962; *Finley v. Territory* (Okla.) 73 Pac. 273.

¹¹⁹ *State ex rel. Bauman v. Judge*, 38 La. Ann. 43, 58 Am. Rep. 158.

¹²⁰ *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903.

¹²¹ *Payne v. English*, 79 Cal. 540, 21 Pac. 952; *Buchanan v. Beaver*, 171 Pa. 567, 33 Atl. 115; *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556; *Morton v. Carlin*, 51 Neb. 202, 70 N. W. 966; *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091; *Northern Pac. R. Co. v. Spokane* (C. C.) 52 Fed. 428; *Ambrose v. Buffalo* (Super. N. Y.) 20 N. Y. Supp. 129; *Quinton v. Burton*, 61 Iowa, 471, 16 N. W. 569; *Dudley v. Frankfort Trustees*, 12 B. Mon. (Ky.) 610; *City of Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265.

will carefully inquire whether the threatened act of the officer is beyond his proper discretion. If not, the injunction will be refused.¹²²

REMOVAL.

88. Generally, the power of removal is an incident of the power of appointment; and, where an officer holds during the will and pleasure of the appointing power, that power is also the removing power, and is sole judge of the propriety of removal.

The legislature may authorize the removal of appointive officers at the will of the appointing power,¹²³ but an elective officer can be removed from office only by due process of law.¹²⁴ The power of removal includes the power of suspen-

¹²² *Heffran v. Hutchins*, 180 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353; *Knapp, Stout & Co. Company v. St. Louis*, 153 Mo. 560, 55 S. W. 104; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219; *Fellows v. Walker* (C. C.) 39 Fed. 651; *Lane v. Schomp*, 20 N. J. Eq. 82.

¹²³ *Armatage v. Fisher*, 74 Hun, 167, 26 N. Y. Supp. 364; *People v. New York*, 16 Hun (N. Y.) 309; *State v. Williams*, 6 S. D. 119, 60 N. W. 410; *Christy v. Kingfisher* (Okla.) 76 Pac. 135; *People v. Whitlock*, 92 N. Y. 191; *Trainor v. Board*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

In the absence of express grant or implied limitation of authority, a municipal corporation possesses the incidental power to remove for cause the corporate officers, whether elected by it or by the people. *State ex rel. McMahon v. New Orleans*, 107 La. 632, 32 South. 22. But see *Speed v. Detroit*, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555; *Caulfield v. State*, 1 S. C. 461; *People v. McAllister*, 10 Utah, 357, 37 Pac. 578; *State v. Klichli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; *State v. Shearman*, 51 Kan. 686, 35 Pac. 455; *State v. Kennelly*, 75 Conn. 704, 55 Atl. 555.

¹²⁴ *State ex rel. Attorney General v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *People v. Commissioners*, 106 N. Y. 64, 12 N. E. 641; *Trainor v. Board*, supra; *Board of Aldermen v. Darrow*, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215; *Field v. Commonwealth*, 32 Pa. 478.

sion pending trial.¹²⁵ This power may be conferred either upon the mayor or the Governor of the state;¹²⁶ but in case of conviction of crime which disqualifies from holding office, the court may pronounce the sentence of disqualification and removal.¹²⁷

Civil Service.

The courts also exercise control over officers in compelling the enforcement of civil service laws and rules by mandamus.¹²⁸ Following the example set by Congress in 1883 in passing the Pendleton Act, New York in the same year, and Massachusetts the year following, adopted civil service rules applicable to the state, and including the municipalities thereof; and, following these, civil service laws were passed by California, Connecticut, Illinois, Indiana, Louisiana, Ohio, Pennsylvania, Washington, Wisconsin, and some other states.¹²⁹ These laws are not uniform in extent or provisions, but most of them are made applicable to municipalities. Some embrace most of the appointive officers, and some only employés, excepting confidential clerks and agents. Their pur-

¹²⁵ *State ex rel. Campbell v. Commissioners*, 16 Mo. App. 48; *State v. Peterson*, 50 Minn. 239, 52 N. W. 655; *Shannon v. Portsmouth*, 54 N. H. 183. But such suspension cannot be indefinitely without pay. *Gregory v. New York*, 113 N. Y. 416, 21 N. E. 119, 3 L. R. A. 854. Contra, *Tyrrell v. Jersey City*, 25 N. J. Law, 536.

¹²⁶ *State v. Johnson*, 30 Fla. 433, 11 South. 845, 18 L. R. A. 414; *Carr v. State*, 111 Ind. 101, 12 N. E. 107; *State v. Kennelly*, 75 Conn. 704, 55 Atl. 555; *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429; *Commonwealth v. Crogan*, 155 Pa. 448, 28 Atl. 697; *Wilcox v. People*, 90 Ill. 186.

¹²⁷ *State v. Humphreys*, 74 Tex. 466, 12 S. W. 99, 5 L. R. A. 217; *Mayor, etc., of City of Macon v. Shaw*, 16 Ga. 172; *People v. Board*, 9 Hun (N. Y.) 222; *Commonwealth v. Jones*, 10 Bush (Ky.) 725. Contra, *People v. Board*, 11 Hun (N. Y.) 403; *Oliver v. City Council*, 69 Ga. 165.

¹²⁸ *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809.

¹²⁹ 4 Enc. Americana, in verb; *Lindblom v. Doherty*, 102 Ill. App. 14.

pose is to ensure competency of officers and employés, especially the latter. For this purpose tests by examination are prescribed by a board of commissioners provided for in the law, and vested with wide discretion to frame rules and otherwise attend to the details of the law. They are vested with official discretion, but do not exercise judicial powers, and, whenever resisted in the performance of their functions, may call the courts to their assistance.¹³⁰ These acts have been challenged as unconstitutional by the dispensers of patronage and their beneficiaries, but have been generally, if not universally, sustained by the courts.¹³¹

Veteran Acts.

Civil service regulation has been attempted in the so-called "Veteran Acts" of many of the states, giving preference of appointment to soldiers of the Civil War; but the courts have been averse to sustaining and enforcing these acts in municipalities, and commentators note the distinctions between municipal governments and federal and state governments in the matter of reward for military service.¹³² The Veteran Act of New York has been declared unconstitutional by the Supreme Court of that state, as creating a favored class of citizens;¹³³ while a majority of the Supreme Judicial Court of Massachusetts has sustained the Veteran Act of that state, which gives preference only when all other things are equal.¹³⁴

¹³⁰ 2 Smith, Pub. Corp. §§ 1715, 1719.

¹³¹ Rogers v. Common Council, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; People v. Loeffler, 175 Ill. 585, 51 N. E. 785; People v. Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 703.

¹³² BROWN v. RUSSELL, 166 Mass. 14, 43 N. E. 1005, 33 L. R. A. 253, 55 Am. St. Rep. 357; Sullivan v. Gilroy, 55 Hun (N. Y.) 285, 8 N. Y. Supp. 401; Baker v. Delaney, 55 N. J. Law, 9, 25 Atl. 936; State v. Miller, 66 Minn. 90, 68 N. W. 732; Schoolcraft's Adm'r v. Railroad Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579.

¹³³ In re Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447. But see People v. Stratton, 174 N. Y. 531, 66 N. E. 1114.

¹³⁴ BROWN v. RUSSELL, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357.

PERSONAL LIABILITY—CONTRACTS.

89. Without special personal undertaking, officers are not personally liable upon contracts made by them for and on behalf of the corporation.

When contracts are formally made in the name of the corporation questions of personal liability can rarely arise, but upon parol contracts and informal written ones much litigation has arisen over the personal liability of the officers contracting. The courts have usually decided these cases upon the manifest intention of the contracting parties;¹³⁵ for example, it has been held that a note promising payment by the signers "as trustees of school district" did not bind the individual signers, but the school district.¹³⁶ So, for gravel sold on the credit of a town upon the order of a surveyor of highways, with authority to purchase, the town and not the surveyor is liable.¹³⁷ And generally, wherever the promise of a public officer is connected with a subject fairly within the scope of his authority, it will be presumed to have been made in his public character, unless the intention to bind himself personally is evident.¹³⁸ The invalidity of the promise as a municipal contract will not make the officer personally liable without evidence of his intention to become so.¹³⁹ But it has been held that an overseer of the poor makes himself personally liable by promising that he will be responsible for the payment of the charges.¹⁴⁰ In fine, the rule is well settled that wherever the parties understand that the contract is made by the officer on behalf of the corporation, and it is within the

¹³⁵ *Willett v. Young*, 82 Iowa, 292, 47 N. W. 990, 11 L. R. A. 115.

¹³⁶ *Sanborn v. Neal*, 4 Minn. 126 (Gil. 83), 77 Am. Dec. 502.

¹³⁷ *Brown v. Rundlett*, 15 N. H. 360.

¹³⁸ *Parks v. Ross*, 11 How. (U. S.) 362, 13 L. Ed. 730; *TATE v. GREENSBORO*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671.

¹³⁹ *Houston v. Clay County*, 18 Ind. 396; *Boardman v. Hayne*, 29 Iowa, 339; *McCracken v. Lavalle*, 41 Ill. App. 573.

¹⁴⁰ *King v. Butler*, 15 Johns. (N. Y.) 281; *Ives v. Hulet*, 12 Vt. 314.

scope of his authority, the corporation alone is liable, and the officer becomes personally liable only upon manifest intention to that effect.¹⁴¹ It is a general rule that an action for neglect of an official duty can be maintained only against ministerial officers.¹⁴² An officer charged with discretionary power is not liable in damages unless he act arbitrarily and in obvious violation of law.¹⁴³

TORTS.

90. If the duty imposed upon an officer is a duty to the public, a failure to perform it or an inadequate or erroneous performance is a public injury, and must be redressed, if at all, in some form of public prosecution. But if, on the contrary, the duty is a duty to an individual, then the neglect to perform it properly is an individual wrong, and may support an individual action for damages.

It is a general rule that judicial officers acting within their jurisdiction cannot be held personally liable for the improper or erroneous performance of their duties.¹⁴⁴ This rule embraces all officers exercising discretionary powers, and conse-

¹⁴¹ *Blanchard v. Blackstone*, 102 Mass. 343; *Hodges v. Runyan*, 30 Mo. 491; *Balcombe v. Northup*, 9 Minn. 173 (Gil. 159); *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83; *Southworth v. Flanders*, 33 La. Ann. 190; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

¹⁴² *Amy v. Supervisors*, 11 Wall. (U. S.) 136, 20 L. Ed. 101; *Nowell v. Wright*, 8 Allen (Mass.) 166, 80 Am. Dec. 62; *Blair v. Lantry*, 21 Neb. 247, 81 N. W. 790; *Piercy v. Averill*, 37 Hun (N. Y.) 360.

¹⁴³ *Boutte v. Emmer*, 43 La. Ann. 980, 9 South. 921, 15 L. R. A. 63; *Pruden v. Love*, 67 Ga. 190; *McCarthy v. De Armit*, 99 Pa. 63; *Rounds v. Mumford*, 2 R. I. 154; *Baker v. State*, 27 Ind. 485.

¹⁴⁴ *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Mostyn v. Fabrigas*, 1 Smith, Lead. Cas. (8th Ed.) 1027; *People v. Bender*, 36 Mich. 195; *Wamesit Power Co. v. Allen*, 120 Mass. 352.

quently protects members of an equalizing board,¹⁴⁵ inspectors of fruits and meats,¹⁴⁶ board of street commissioners,¹⁴⁷ tax assessors,¹⁴⁸ auditors of claims,¹⁴⁹ officers employed to lay out, alter, and discontinue highways,¹⁵⁰ mayors,¹⁵¹ constables, and justices of the peace,¹⁵² and, generally, all boards invested with discretionary power.¹⁵³ But it is generally held that this exemption from liability in the performance of discretionary public functions does not exist when the officer has been actuated by corrupt or malicious motives,¹⁵⁴ or has practiced fraud upon the person suffering injury.¹⁵⁵ On the contrary,

¹⁴⁵ *Steele v. Dunham*, 26 Wis. 393.

¹⁴⁶ *Fath v. Koeppel*, 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867.

¹⁴⁷ *ROBINSON v. ROHR*, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366, 9 Am. St. Rep. 810; *Atwater v. Trustees*, 124 N. Y. 602, 27 N. E. 385.

¹⁴⁸ *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Cooley, Tax'n*, 551 et seq.

¹⁴⁹ *Wall v. Trumbull*, 16 Mich. 228.

¹⁵⁰ *Sage v. Laurain*, 19 Mich. 137; *TATE v. GREENSBORO*, 114 N. C. 392, 19 S. E. 787, 24 L. R. A. 671; *Scovil v. Geddings*, 7 Ohio, 211, pt. 2; *Squiers v. Neenah*, 24 Wis. 588.

¹⁵¹ *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Pruden v. Love*, 67 Ga. 190.

¹⁵² *Cooley, Torts*, § 419; *Bish. Noncont. Law*, § 783; *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; *Brooks v. Mongan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; *Scott v. Fishplate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Harvey v. Dewoody*, 18 Ark. 252. *Contra*, *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Houlden v. Smith*, 14 Adol. & E. (N. S.) 841.

¹⁵³ *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463; *Mostyn v. Fabrigas*, 1 Smith, Lead. Cas. (8th Ed.) 1027; *Craig v. Burnett*, 32 Ala. 728; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256.

¹⁵⁴ *McTeer v. Lebow*, 85 Tenn. 121, 2 S. W. 18; *Wilkes v. Dinsman*, 7 How. (U. S.) 89, 12 L. Ed. 618; *Hoggatt v. Bigley*, 6 Humph. (Tenn.) 236; *Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343. Public officers may also be liable in a criminal action for negligence in the performance of their duty, and this is particularly so with police officers. *People v. Diamond*, 72 App. Div. 281, 76 N. Y. Supp. 57; *People v. Foody*, 39 Misc. Rep. 142, 79 N. Y. Supp. 240.

¹⁵⁵ *City of Oakland v. Carpentier*, 13 Cal. 540; *Roper v. McWhorter*, 77 Va. 214.

the general rule is that in the performance of merely ministerial duties an officer is liable to third persons for injury suffered by his nonfeasance or misfeasance,¹⁵⁶ and this rule applies not only to purely ministerial officers, but also to those whose duties are partly discretionary and partly ministerial.¹⁵⁷

Illustrations.

For example, a board of street commissioners, in determining upon the work to be done on adopting plans and specifications therefor, act as judicial officers, and no private action will lie against them for damage done in exercising these functions. But if they undertake to execute these plans and specifications, either personally or with the aid of employes, they are liable to third persons for injury suffered from such acts, which are done in a ministerial capacity.¹⁵⁸ It has accordingly been held that a mayor, marshal, and board of health were liable for negligence in removing from the city a smallpox patient and carelessly exposing him to inclement weather so as to cause his death.¹⁵⁹ So also is a public meat inspector for failing to discharge his duty;¹⁶⁰ and street officers for injury done to an adjoining property by changing the grade of the street.¹⁶¹ A ministerial act has been judicially defined to be "one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to, or the exercise of, his

¹⁵⁶ *Amy v. Supervisors*, 11 Wall. (U. S.) 136, 20 L. Ed. 101; *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Hover v. Barkhoof*, 44 N. Y. 113; *Allen v. Commonwealth*, 83 Va. 94, 1 S. E. 607.

¹⁵⁷ *ROBINSON v. ROHR*, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366, 9 Am. St. Rep. 810; *Rounds v. Mumford*, 2 R. I. 154.

¹⁵⁸ *ROBINSON v. ROHR*, *supra*. See *BOWDEN v. DERBY*, 97 Me. 536, 55 Atl. 417, 63 L. R. A. 223, 94 Am. St. Rep. 516; *Buskirk v. Strickland*, 47 Mich. 389, 11 N. W. 210.

¹⁵⁹ *Aaron v. Brolles*, 64 Tex. 316, 53 Am. Rep. 764.

¹⁶⁰ *Hayes v. Porter*, 22 Me. 271.

¹⁶¹ *Rives v. Columbla*, 80 Mo. App. 173; *Rounds v. Mumford*, 2 R. I. 154.

own judgment upon the propriety of the act done.”¹⁶³ For the nonfeasance or misfeasance of such official acts the officer is held liable in law;¹⁶³ but if he discharge such duties faithfully he is not liable, though injury may result therefrom.

Exemption from Liability.

It is also held that an officer is not liable to a private action for neglect of an exclusively public duty, even to a person specially injured thereby, and in some cases even though the act was unlawful and malicious.¹⁶⁴ This results from the exemption of the sovereign from suit, and the consequent exemption of the public officer performing the functions of the sovereign. Damage alone does not constitute a wrong; the party injured by an officer must show that he suffers from the neglect of some private duty which the officer owed to him.¹⁶⁵

¹⁶³ *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468. But see *Interstate Transp. Co. v. New Orleans*, 52 La. Ann. 1859, 28 South. 310.

¹⁶³ *Woolley v. Baldwin*, 101 N. Y. 688, 5 N. E. 573; *Conway v. Russell*, 151 Mass. 581, 24 N. E. 1026; *Olmsted v. Dennis*, 77 N. Y. 378; *Eslava v. Jones*, 83 Ala. 139, 3 South. 317, 3 Am. St. Rep. 699; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Raynsford v. Phelps*, 48 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; *Sawyer v. Corse*, 17 Grat. (Va.) 230, 99 Am. Dec. 445; *Long v. Long*, 57 Iowa, 497, 10 N. W. 875; *Collins v. McDaniel*, 66 Ga. 203; *St. Joseph Fire & Marine Ins. Co. v. Leland*, 90 Mo. 177, 2 S. W. 431, 59 Am. Rep. 9; *Stevens v. Dudley*, 56 Vt. 158.

¹⁶⁴ *Cooley*, Torts, p. 146; *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843.

¹⁶⁵ *Sage v. Laurain*, 19 Mich. 137; *Inhabitants of Trescott v. Moan*, 50 Me. 347; *Billingsley v. State*, 14 Md. 369; *Held v. Bagwell*, 58 Iowa, 139, 12 N. W. 226.

REIMBURSEMENT OF MUNICIPALITY FOR LOSS.

- 91. An officer is liable to remunerate the municipality in any sum which it has lost or been compelled to pay in consequence of his official nonfeasance, misfeasance, or malfeasance of ministerial duty.**

Obviously a fiscal officer who converts or loses municipal funds is personally liable to the corporation therefor. This liability is usually covered by an official bond; but whether the city have such bond or not there is a common-law liability on the part of the officer.¹⁶⁶ So, also, if in the exercise of his official functions, an officer so negligently, maliciously, or corruptly performs or fails to perform his duties as to render the corporation liable therefor to a third person, for which he recovers judgment against it, the officer, upon fundamental principles of law, is liable to an action by the municipality to reimburse it in the sum it has been thus compelled to pay for his official neglect of duty.¹⁶⁷

AGENTS.

- 92. Municipal agents include all those officers, persons, and boards which are authorized by law to represent the corporation and bind it in its contracts and dealings with third persons.**

A corporation can act only through human agency. Its complex organization sometimes requires very many agents to

¹⁶⁶ *Inhabitants of Hancock v. Hazzard*, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; *Thompson v. Stickney*, 6 Ala. 579; *City of New Haven v. Fresenius*, 75 Conn. 145, 52 Atl. 823; *City of Lancaster v. Arnold* (Ky.) 45 S. W. 82; *People v. Bender*, 36 Mich. 195; *Bennett v. Whitney*, 94 N. Y. 302; *People v. Cooper*, 10 Ill. App. 384.

¹⁶⁷ 1 Dill. Mun. Corp. §§ 236, 237; *Rollins v. Board*, 15 Colo. 103, 25 Pac. 319; *City of Greenville v. Anderson*, 58 Ohio St. 463, 51 N. E. 41; *Porter v. Thomson*, 22 Iowa, 391; *Adams v. Lee*, 72 Miss. 281, 16 South. 243.

execute its multiform powers and discharge its various duties. The general managing agent of the corporation, as we have heretofore seen, is the governing body or common council, resembling the directory of a private corporation;¹⁶⁸ but for the performance of the various municipal functions there are constituted a great variety of boards of commissioners, such as fire, street, water, police, dock, park, and the like. These are permanent positions, and are usually called and treated as offices, and governed by the law controlling them.¹⁶⁹ Besides these are often constituted temporary boards or personal agents for the accomplishment of some special work or the discharge of some temporary duty. Such boards and persons are usually and properly denominated municipal agents, as distinguished from officers.¹⁷⁰ The powers and duties of these agents are prescribed by law. This is the limit of their authority to represent and bind the corporation. All persons dealing with them as such corporation agents are bound to take notice of the scope of their agency.¹⁷¹ Beyond this limit

¹⁶⁸ Ante, § 71; 1 Dill. Mun. Corp. c. 10; Elliott, Mun. Corp. §§ 253, 255.

¹⁶⁹ Elliott, Mun. Corp. §§ 252, 258; *Boehm v. Baltimore*, 61 Md. 250; *People v. McClave*, 99 N. Y. 83, 1 N. E. 235; *Mayor, etc., of Mobile v. Squires*, 49 Ala. 339; *Bonebrake v. Wall*, 11 Ohio Dec. 38.

¹⁷⁰ *Pinney v. Brown*, 60 Conn. 164, 22 Atl. 430; *New York, N. H. & H. R. Co. v. Wheeler*, 72 Conn. 481, 45 Atl. 14; *Barker v. Southern Const. Co.*, 20 Ky. Law Rep. 796, 47 S. W. 608; *REUTING v. TIT-USVILLE*, 175 Pa. 512, 34 Atl. 916.

This employment of an agent to perform services for a municipality need not necessarily be by a formal ordinance, by-law, or resolution, nor is it essential that a contract be in writing. It may arise by implication, or from ratification of acts done by one assuming to act for the corporation. *Wilt v. Redkey*, 29 Ind. App. 199, 64 N. E. 228.

¹⁷¹ *Condran v. New Orleans*, 43 La. Ann. 1202, 9 South. 81; *Mayor, etc., of Baltimore v. Eschbach*, 18 Md. 276; *State v. Railroad Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656. Cf. *City of Chicago v. Williams*, 182 Ill. 135, 55 N. E. 123; *Kerr v. Bellefontaine*, 59 Ohio St. 446, 52 N. E. 1024; *Mayor, etc., of Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 458; *Parsel v. Barnes*, 25 Ark. 261; *Moore v. New York*, 73 N. Y. 238, 29 Am. Rep. 134.

they may not go in corporate affairs. If they transgress these lawful boundaries they cannot bind the corporation, but may thereby incur personal liability to third parties.¹⁷² They are not, however, liable to the corporation for these ultra vires acts.¹⁷³

EMPLOYEES.

93. An employé of a municipal corporation, being engaged in the performance of a service purely ministerial, is not an officer nor an agent of the municipality, and cannot place it under obligation or liability.

The great mass of persons rendering service to a municipality are employés only, such as clerks, laborers, mechanics, firemen, and the like.¹⁷⁴ Their positions are permanent; the duties those of a subordinate. They constitute the rank and file of municipal forces, acting always in obedience to fixed rules or the orders of their superiors. They make no contracts for the municipality, and exercise no municipal discretion; and the only mode by which they may subject it to liability is that whereby private corporations may be rendered liable for the acts of their employés,¹⁷⁵ to wit, by some act

¹⁷² This will occur, however, only when such third persons are actually ignorant of the want of power, and the officers take unfair advantage of them, or practice fraud upon them. Otherwise they have been repeatedly adjudged not liable personally in ultra vires contracts made by them. *Barnes v. Philadelphia*, 3 Phila. (Pa.) 409; *Mayor, etc., of Baltimore v. Eschbach*, 18 Md. 276; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Tucker v. Justices*, 35 N. C. 434; *Lyon v. Irish*, 58 Mich. 518, 25 N. W. 502; *Houston v. Clay County*, 18 Ind. 396; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Huthsing v. Bousquet* (C. C.) 2 McCrary, 152, 7 Fed. 833.

¹⁷³ *Houston v. Clay County*, 18 Ind. 396; *Nickerson v. Dyer*, 105 Mass. 320; *Davis v. Philadelphia*, 3 Phila. (Pa.) 374.

¹⁷⁴ *Trainor v. Board*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; *McNulty v. New York*, 60 App. Div. 250, 70 N. Y. Supp. 133.

¹⁷⁵ *Clark, Priv. Corp.* § 69; *Kinnare v. Chicago*, 171 Ill. 332, 49 N. E. 536; *Stephani v. Manitowoc*, 89 Wis. 467, 62 N. W. 176; *HAYES v. OSHKOSH*, 33 Wis. 314, 14 Am. Rep. 760; *Knight v.*

done for the municipality within the apparent scope of their employment which causes actionable injury to another, and then only in the performance of strictly municipal functions of the corporation. Employés are liable to the municipality under the same rules and restrictions as municipal officers, and are generally within civil service regulations.

Philadelphia, 15 Wkly. Notes Cas. (Pa.) 307; Hafford v. New Bedford, 16 Gray (Mass.) 297; Alexander v. Vicksburg, 68 Miss. 564, 10 South. 62; Kies v. Erie, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867.

CHAPTER XII.**CONTRACTS.**

- 94. Municipal Contracts.
- 95. Ultra Vires.
- 96. Estoppel.
- 97. Contracts Partially Ultra Vires.
- 98. Implied Promise.
- 99. Subject-Matter.
- 100. Contracting Agencies.
- 101. Mode of Contracting.
- 102. Letting of Contracts.
- 103. Illegal Contracts.
- 104. Annulling Contracts.
- 105. Impairing Obligations.
- 106. Money Contracts.

MUNICIPAL CONTRACTS.

- 94. Municipal contracts possess the same essential elements, and are executed, enforced, rescinded, and reformed under the same general doctrines, as those governing contracts between individuals.**

The fundamental doctrines of the law of contracts, and especially those governing the contracts of corporations as set forth in the standard text-books and declared and enforced by the courts, are generally applicable to all municipal contracts; they need not be here stated. Within the scope of its charter powers and in the manner permitted by law, a municipal corporation may enter into contract relations with other persons, having the same general effect and obligation as those of a private corporation or a natural person,¹ and for

¹ 1 Dill. Mun. Corp. § 935; *Ryan v. Paterson*, 66 N. J. Law, 533, 49 Atl. 587; *City of Louisville v. President*, 15 B. Mon. (54 Ky.) 642; *The Maggie P.*, 25 Fed. 202; *Pullman v. New York*, 54 Barb. (N. Y.) 169.

breach of such contract it will incur similar liability.² The courts will enforce such contracts and redress the breach thereof, either for or against the municipal corporation, in the same manner and to the same extent as other contracts between other classes of persons.³ These general doctrines of law, therefore, are to be considered and applied in formulating, interpreting, and enforcing municipal contracts, and in protecting rights and redressing wrongs of the parties thereto. Such contracts are usually written and signed on behalf of the municipality by the duly constituted authority; but when properly authorized, a valid municipal contract may be made by parol;⁴ and there are many cases giving redress against municipal corporations for breach of implied contracts of the municipality.⁵

² *Wells v. Atlanta*, 43 Ga. 67; *City of Galveston v. Loonie*, 54 Tex. 517; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *City of New Orleans v. Churchwardens*, 11 La. Ann. 244.

³ *City of Buffalo v. Bettinger*, 76 N. Y. 393; *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557.

⁴ *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Ross v. Madison*, 1 Ind. 281, 48 Am. Dec. 361; *City of Selma v. Mullen*, 46 Ala. 411; *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Baker v. Johnson Co.*, 33 Iowa, 151; *FANNING v. GREGOIRE*, 16 How. (U. S.) 524, 14 L. Ed. 1043; *Reed v. Orleans*, 1 Ind. App. 25, 27 N. E. 109; *Duncombe v. Ft. Dodge*, 38 Iowa, 281.

⁵ *City of Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637; *Maher v. Chicago*, 38 Ill. 266; *Peterson v. Mayor*, 17 N. Y. 449; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. (Ky.) 41; *City of Davenport v. Insurance Co.*, 17 Iowa, 276; *Brush Electric Light & Power Co. v. City Council*, 114 Ala. 433, 21 South. 960; *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612; *Fox v. Richmond*, 40 S. W. 251, 19 Ky. Law Rep. 326; *City of Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483; *Tufts v. Chester*, 62 Vt. 353, 19 Atl. 988; *Memphis Gaslight Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25. Where the city charter fails to provide for furnishing water and light, it has an implied power to contract for such light and water. *Lake Charles Ice, Light & Water Works Co. v. Lake Charles*, 106 La. Ann. 65, 30 South. 289. See, also, *Tucker v. Virginia City*, 4 Nev. 20; *Port Jervis Water Works Co. v. Port Jervis*, 151 N. Y. 111, 45 N. E. 388; *Garrison v. Chicago*, 7 Biss. 480, Fed. Cas. No. 5,255.

ULTRA VIRES.

95. The capacity of the municipal corporation to make a binding contract is dependent upon power, express or implied, conferred upon it by its charter; and contracts made by a municipality repugnant to or outside of the scope of its charter are ultra vires and void.

Much confusion and discord appears in the decisions and text-books on corporations upon the doctrine of "ultra vires," resulting chiefly from the use of this phrase in different senses. It has been used to characterize not only acts which are repugnant to or beyond the corporate powers,⁶ but also acts beyond the authority of the officers or agents doing them,⁷ and acts done by a majority of stockholders in disregard of the rights of the minority.⁸ To avoid, if possible, this confusion, the phrase "ultra vires" will be used in this chapter in the sense declared to be proper by a distinguished federal judge in the following lucid and comprehensive statement: "Two propositions are settled: One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which creates it consents, ultra vires * * *; the other is that the powers of a corporation are such, and such only, as its charter confers, and an act beyond the measure of these powers, as either expressly stated or fairly implied, is ultra vires. * * * These two propositions embrace the whole doctrine of ultra vires; they are its alpha and omega." ⁹ To escape the apparent injustice of enforcing this doctrine in regard to the dealings and doings of private corporations, the

⁶ Reese, *Ultra Vires*, § 17.

⁷ *Demarest v. New Barbadoes Tp.*, 40 N. J. Law, 604.

⁸ Reese, *Ultra Vires*, § 17.

⁹ Mr. Justice Brewer, dissenting in *Chicago, R. I. & P. R. Co. v. Railway Co.*, 47 Fed. 15. Properly, ultra vires means beyond the powers of the corporation itself. *Camden & A. R. Co. v. Landing Co.*, 48 N. J. Law, 530, 7 Atl. 523.

courts have apparently in many instances either ignored or evaded its full force and meaning, and have thus shown "how hard cases can make bad law."¹⁰ This has not been so, however, with regard to contracts of public corporations.¹¹ Generally, the courts have recognized as a truism that what a municipality has no power to do it has not done merely because it tried to do it, and have accordingly refused to give legal effect to ultra vires contracts.¹²

Illustrations.

And so it has been declared that contracts by which a municipality gave away or exchanged city streets for other property,¹³ offered a reward for the apprehension of a person,¹⁴ borrowed money to pay the expenses of an election contest over the removal of a county seat,¹⁵ or to make loans and donations to colleges,¹⁶ are ultra vires, and not

¹⁰ *Wright v. Pipe Line Co.*, 101 Pa. 204, 47 Am. Rep. 701; *Towers Excelsior & Ginnery Co. v. Inman*, 96 Ga. 506, 23 S. E. 418; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Portland Lumbering & Mfg. Co. v. East Portland*, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; *Bissell v. Railroad Co.*, 22 N. Y. 259; *Dewey v. Railway Co.*, 91 Mich. 351, 51 N. W. 1063; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

¹¹ 1 Dill. Mun. Corp. § 457.

¹² *THOMAS v. RICHMOND*, 12 Wall. (U. S.) 849, 20 L. Ed. 453; *Selbrecht v. New Orleans*, 12 La. Ann. 496; *HAGUE v. PHILADELPHIA*, 48 Pa. 527; *CLARK v. DES MOINES*, 19 Iowa, 199, 87 Am. Dec. 423; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375; *Burrill v. Boston*, 2 Cliff. 590, Fed. Cas. No. 2,198; *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 144; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Mitchell v. Rockland*, 41 Me. 363, 66 Am. Dec. 252.

¹³ *Beebe v. Little Rock*, 68 Ark. 39, 56 S. W. 791.

¹⁴ *Hanger v. Des Moines*, 52 Iowa, 193, 2 N. W. 1105, 35 Am. Rep. 266; *Patton v. Stephens*, 14 Bush (Ky.) 324; *City of Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822. *Contra*, *Borough of York v. Forscht*, 23 Pa. 391.

¹⁵ *Myers v. Jeffersonville*, 145 Ind. 431, 44 N. E. 452.

¹⁶ *City of Fulton v. College*, 158 Ill. 333, 42 N. E. 138.

enforceable at law. So, likewise, of a purchase by a city of a right of way for a railroad;¹⁷ a contract granting a monopoly of the streets to a water company;¹⁸ promising money to aid in the erection of a county courthouse, or to donate its real estate for that purpose;¹⁹ also county bonds issued without legislative authority;²⁰ and a promise not to extend a street in a city.²¹ These and many other similar contracts the courts have refused to enforce or recognize, because they were illegal restrictions of the public power and duty of the municipality, or because they were beyond the scope of the municipal powers. Some earlier cases were not in accord with these decisions, but supported the unlawful contract upon the doctrine of estoppel, so often applied formerly to the contracts of private corporations.²² But there is at present general concurrence in the doctrine that the law will not recognize or enforce a municipal contract which it does not authorize.²³ Parties, therefore, seeking recompense for money loaned, material furnished, or labor done for a municipal corporation under an ultra vires contract, do not sue for breach of the contract or seek specific performance thereof, but seek recompense either upon the theory of an implied contract and assumpsit, or under some doctrine of equity.²⁴

¹⁷ *Strahan v. Malvern*, 77 Iowa, 454, 42 N. W. 369.

¹⁸ *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

¹⁹ *Russell v. Tate*, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193; *Brockman v. Creston*, 79 Iowa, 587, 44 N. W. 822.

²⁰ *Town of CONCORD v. ROBINSON*, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. Ed. 885.

²¹ *Grand Rapids v. Railroad Co.*, 66 Mich. 42, 33 N. W. 15.

²² *Clark, Priv. Corp.* pp. 179-183, § 67.

²³ *City of Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 118; *Cowdrey v. Caneadea*, 16 Fed. 532; *City of Ft. Wayne v. Lehr*, 88 Ind. 62; *Schneider v. Menasha (Wis.)* 95 N. W. 94.

²⁴ *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659; *Schneider v. Menasha*, *supra*; *Thomson v. Town of Elton*, 109 Wis. 589, 85 N. W. 423.

ESTOPPEL.

96. Municipal contracts which are within the scope of corporate powers, but which are defective because of irregularity in the method of their execution, or unlawful because of a secret purpose of the corporation, are not void, but are subjects of ratification and estoppel.

Irregular contracts, or contracts within the scope of corporate powers, but made for some private purpose not permitted by the charter, have often been called "ultra vires contracts," but they are not within the definition given in the last section. Such contracts may be originally invalid because of insufficient notice, defective execution, informality, or some other irregularity in the exercise of power confessedly possessed by the corporation;²⁵ or such unquestioned power may be used by the corporation secretly for some purpose for which it has not been granted, as to borrow money and execute bonds for payment of current expenses of the municipality when the lender supposed it was to be applied to lawful purposes.²⁶ Such contracts being within the apparent scope of the corporate powers, and their defects not being obvious nor known to the other party, are generally held to be voidable only upon such terms and conditions as apply to rescission.²⁷ And so, if the corporation under a contract of this kind has obtained value from the other party, it cannot avoid or rescind the contract except upon the condition of complete restitution

²⁵ *MOORE v. NEW YORK*, 73 N. Y. 238, 29 Am. Rep. 134; *MINERS' DITCH CO. v. ZELLERBACH*, 37 Cal. 543, 99 Am. Dec. 300; *North-west Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781; *HITCHCOCK v. GALVESTON*, *supra*.

²⁶ *Curtis v. Leavitt*, 15 N. Y. 9; Mayor, etc., of City of Nashville *v. Ray*, 19 Wall. (U. S.) 468, 22 L. Ed. 164; *Gause v. Clarksville*, 5 Dill. 165, Fed. Cas. No. 5,275; *Robertson v. Breedlove*, 61 Tex. 316; *Thomas v. Port Huron*, 27 Mich. 320.

²⁷ *Clark, Priv. Corp.* § 67. *Washington Female Seminary v. Washington Borough*, 18 Pa. Super. Ct. 555; *United States Waterworks Co. v. Borough of Dubois*, 176 Pa. 439, 35 Atl. 251.

or recompense;²⁸ and if the municipality recognizes such contract, with full knowledge of the facts, it may thus waive objection and ratify the same and become bound thereby;²⁹ as, where officers or a board having no authority therefor make a contract for a city within the scope of its charter powers, the common council or other board empowered to make such contract may subsequently adopt or ratify the same,³⁰ just as a natural person may ratify the unauthorized contract of his agent. But some cases hold that such municipal contract is void if it be made for a purpose or object not permitted by the charter, as, for instance, if the corporation, without special authority, borrow money for the purpose of paying pre-existing indebtedness, such contract is void.³¹

Estoppel.

But it has been declared that the doctrine of ultra vires does not absolve municipal corporations from the principle of common honesty.³² And so "where an act in its external aspects is within the general powers of a corporation, and is

²⁸ MOORE v. NEW YORK, 73 N. Y. 238, 29 Am. Rep. 134; Marble Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71; CENTRAL TRANSP. CO. v. PALACE CAR CO., 139 U. S. 60, 11 Sup. Ct. 478, 35 L. Ed. 55; Chapman v. Douglas County, 107 U. S. 349, 2 Sup. Ct. 62, 27 L. Ed. 378; Leonard v. Canton, 35 Miss. 189; City of Ft. Scott v. Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; City of Chicago v. Milling Co., 97 Ill. App. 651; Id., 63 N. E. 1043; City of Newport v. Phillips (Ky.) 40 S. W. 378; Warner v. New Orleans, 87 Fed. 829, 31 C. C. A. 238; Ohio Life Ins. & Trust Co. v. Trust Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; Paul v. Kenosha, 22 Wis. 266, 94 Am. Dec. 598; City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; Thomas v. Port Huron, 27 Mich. 323.

²⁹ Albany City Nat. Bank v. Albany, 92 N. Y. 363; City of Philadelphia v. Hays, 93 Pa. 72; Lincoln v. Stockton, 75 Me. 141; Devers v. Howard, 88 Mo. App. 253.

³⁰ City of Little Rock v. Bank, 98 U. S. 308, 25 L. Ed. 108.

³¹ AGAWAM NAT. BANK v. SOUTH HADLEY, 128 Mass. 503.

³² Bass Foundry & Machine Works v. Commissioners, 115 Ind. 234, 17 N. E. 593.

only unauthorized because it is done with a secret unauthorized intent, the defense of ultra vires will not prevail against a stranger who in good faith dealt with it without notice of such intent."³³ Also where the other contracting party has in good faith performed his part of the contract, the municipality will be held estopped from pleading the shortcomings or faults of its own officers or agents in all cases where the contract is not repugnant to or beyond the scope of the corporate power.³⁴ But if the contract be ultra vires in the true sense, then neither estoppel nor ratification will prevent the municipality from pleading ultra vires, and thereby defeating an action brought upon the contract.³⁵ So, likewise, a party sued by a municipality upon an unauthorized contract made with it may rely upon the doctrine of ultra vires to defeat the action.³⁶

CONTRACTS PARTIALLY ULTRA VIRES.

97. A contract is not of necessity entirely invalid because a portion of it is ultra vires. In such case, if the portions of the contract which are within the charter powers are separable from the ultra vires portion, the latter only is void.

This distinction has been taken in many cases, and must be regarded as settled law. In a leading case the city had made a contract for paving its streets, to do which it was fully authorized, and promised to give its negotiable bonds in pay-

³³ 2 Dill. Mun. Corp. § 936.

³⁴ HITCHCOCK v. GALVESTON, 96 U. S. 341, 24 L. Ed. 659; Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; London & N. Y. Land Co. v. Jellico, 103 Tenn. 320, 52 S. W. 995; MOORE v. NEW YORK, 73 N. Y. 238, 29 Am. Rep. 134; Sharp v. Teese, 9 N. J. Law, 352, 17 Am. Dec. 479.

³⁵ Mor. Priv. Corp. § 619; Ellis v. City of Cleburne (Tex.) 35 S. W. 495; Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524.

³⁶ Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Montgomery City Council v. Plank Road Co., 31 Ala. 76; Hodges v. Buffalo, 2 Denio (N. Y.) 110; Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 319, 29 Am. Dec. 543.

ment therefor; but for this it had no authority. The work was completed, but the city refused to execute its bonds, and thereupon the contractors brought an action for damages for breach of contract against the city, which pleaded *ultra vires*. The court ruled that, though specific performance might not be decreed in behalf of the contractors, yet the action for damages was maintainable. The city had power to contract for the doing of the work, and could not escape liability therefor because it had promised payment by unlawful means. "It matters not," said the court, "that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment may not be made at all; such is not the law. The contract between the parties is in force so far as it is lawful."²⁷ So, likewise, where a city having power to provide for gas contracted therefor with a private corporation, but without power so to do assumed to grant the gas company an exclusive franchise, in this case the court declared the true rule to be that "when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which was void."²⁸

IMPLIED PROMISE.

98. A municipality may be liable in *assumpsit* upon an implied contract to pay value for what it has received, where it has made no express promise therefor, or has made an invalid promise which will not sustain an action.

In a leading case it was declared that "the doctrine of implied municipal liability applied to cases where money or other

²⁷ *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659.

²⁸ *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same."³⁹ This doctrine has been generally enforced in the American courts, both state and federal;⁴⁰ but it must not be inferred that the law will imply that of a contract which is strictly ultra vires, nor that the courts will raise such an implied promise as may not be expressly made.⁴¹ In general, however, whenever a municipal corporation receives money or property, or accepts the benefit of labor or services rendered to it, it is bound in law to make recompense therefor.⁴² As we have seen in the last section, its promise to pay in bonds which it has no authority to issue cannot be enforced;⁴³ but an action of assumpsit will lie to recover judgment for the amount promised in bonds, or quantum meruit, or quantum valebant.⁴⁴ The same action may also be brought where no

³⁹ *ARGENTI v. SAN FRANCISCO*, 16 Cal. 255.

⁴⁰ *MARSH v. FULTON COUNTY*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *CITY OF LOUISIANA v. WOOD*, 102 U. S. 294, 26 L. Ed. 153; *Schipper v. Aurora*, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318.

⁴¹ *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Brush Electric Light & Power Co. v. City Council*, 114 Ala. 433, 21 South. 960; *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612; *Burrill v. Boston*, 2 Cliff. 596, Fed. Cas. No. 2,198. A municipal corporation does not become liable for a debt for substituting the fiction of an implied contract for an express contract, void for noncompliance with the terms of a statute. *Moss v. Ridge Tp. (Ind.)* 67 N. E. 460.

⁴² *ARGENTI v. SAN FRANCISCO*, 16 Cal. 255. If one deals with a municipal corporation in respect to a matter beyond its corporate power, he can have no relief either at law or in equity, though in the absence of prohibition he may obtain relief, if not guilty of more than constructive wrong, so far as his money or property shall have been used by the municipality for legitimate corporate purposes. *Balch v. Beach (Wis.)* 95 N. W. 132. A city, like an individual or private corporation, may bind itself by implied contracts. *City of Austin v. Bartholomew*, 107 Fed. 349, 46 C. C. A. 327; *Nalle v. Austin, Id.*; *Wentink v. Passaic Co.*, 66 N. J. Law, 65, 48 Atl. 609.

⁴³ *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659.

⁴⁴ *CITY OF LOUISIANA v. WOOD*, 102 U. S. 294, 26 L. Ed. 153;

fixed compensation has been agreed upon, or where no express contract of any kind has been made.⁴⁵ In short, the doctrines of assumpsit are applicable to municipalities as well as to natural persons, and the action may be maintained on any of the common counts, "not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial."⁴⁶ In the first case above quoted the following distinctions, however, were taken: "The money must have gone into her treasury, or been appropriated by her; and, when it is property other than money, it must have been used by her or been under her control. But with reference to services rendered, the case is different. Their acceptance must be evidenced by ordinance, or express corporate action to that effect. If not originally authorized, no liability can attach upon any ground of implied contract; the acceptance, upon which alone the obligation to pay could arise, would be wanting."⁴⁷ This discrimination in favor of property and money over labor and other services does not meet with unanimous approval by the courts,⁴⁸ and in Massachusetts it has been held that one who loans money to a town treasurer in a manner not authorized by statute has

MARSH v. FULTON CO., 10 Wall. (U. S.) 676, 19 L. Ed. 1040; **Thomas v. Port Huron**, 27 Mich. 320; **Maher v. Chicago**, 38 Ill. 266; **Allegheny v. McClurkan**, 14 Pa. 81; **Higgins v. Water Co.**, 118 Cal. 524, 45 Pac. 824; **Schipper v. Aurora**, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318; **Marble Co. v. Harvey**, 92 Tenn. 125, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71.

⁴⁵ **Fox v. Richmond**, 40 S. W. 251, 19 Ky. Law Rep. 326. Where a municipal corporation retains benefits under a contract which it has power to make, but which is void because irregularly executed, a recovery may be had on a quantum meruit without showing a ratification by the municipal corporation. **Lincoln Land Co. v. Village of Grant**, 57 Neb. 70, 77 N. W. 349.

⁴⁶ **MARSH v. FULTON CO.**, 10 Wall. (U. S.) 676, 19 L. Ed. 1040.

⁴⁷ **ARGENTI v. SAN FRANCISCO**, 16 Cal. 255.

⁴⁸ 1 Dill. Mun. Corp. § 464; **Maher v. Chicago**, 38 Ill. 266; **Peterson v. Mayor**, 17 N. Y. 450.

no right of action against the town to recover it, although the money was used in paying the debt of the town.⁴⁹

SUBJECT-MATTER.

99. Municipal contracts, whether made under express, implied, or inherent power to contract, must necessarily be confined to such subjects only as are usually proper and essential for performance of the corporate functions of the municipality.

It is obvious that a municipal corporation may not engage in business and make contracts upon all sorts of subjects, as may a natural person.⁵⁰ Nor may it engage in profit-making, like a private corporation, except in such municipal affairs as are specially authorized.⁵¹ The general power to contract and be contracted with, usually expressed in the municipal charter, is impliedly restricted to solely municipal purposes.⁵²

⁴⁹ *AGAWAM NAT. BANK v. SOUTH HADLEY*, 128 Mass. 503. And where a mayor of a city, without authority, executed a contract on behalf of the city, the city was held not estopped to deny the same, it not having received any benefits thereunder. *Indiana Road-Mach. Co. v. Sulphur Springs* (Tex.) 63 S. W. 908. But where one in good faith loaned money to a town, to be used for a corporate purpose, taking its bonds therefor, he was held entitled to recover. in an action for money had and received, where the bonds were void for want of power in the town to issue them. *Fernald v. Town of Gilman*, 123 Fed. 797.

⁵⁰ 1 Dill Mun. Corp. § 443; *Village of Kent v. Cut-Glass Co.*, 10 Ohio Cir. Ct. R. 629.

⁵¹ *Goodrich v. Detroit*, 12 Mich. 279; *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671; *City of Galveston v. Loonle*, 54 Tex. 517. Herein are public utilities, such as water and light.

⁵² *Wells v. Atlanta*, 43 Ga. 67; *Miller v. Milwaukee*, 14 Wis. 642; *City of Wyandotte v. Zeitz*, 21 Kan. 649. A public corporation cannot make a contract to provide an entertainment for its citizens and guests. *Commonwealth v. Gingrich*, 21 Pa. Super. Ct. 286. The public purposes for which cities may incur liability will not be restricted to those for which precedents can be found, but the test is

A municipality, therefore, though it may contract with regard to not only its strictly public functions, but also with regard to such municipal matters as lights, water, and power for the use of itself and its inhabitants, has no authority to embrace within its contracts such subject-matter as manufacturing,⁵³ extraterritorial railway construction and operation,⁵⁴ merchandising,⁵⁵ nor to become surety,⁵⁶ nor issue a circulating medium,⁵⁷ unless specially conferred.

CONTRACTING AGENCIES.

100. Municipal contracts are necessarily made for the corporation by its duly constituted and authorized agencies, which may be either boards or individuals.

The common council is the proper general agent of the municipality to express the agreement essential to a valid contract,⁵⁸ and such agreement is usually expressed either by ordinance or resolution upon the municipal record. The for-

whether the work is required for the general good of all the inhabitants of the city. *Sun Printing & Publishing Ass'n v. New York*, 8 App. Div. 230, 40 N. Y. Supp. 607; *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191.

⁵³ *Cook v. Manufacturing Co.*, 1 Sneed (Tenn.) 698; *Starin v. Genoa*, 23 N. Y. 439; *Pitzman v. Freeburg*, 92 Ill. 111; *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981.

⁵⁴ *KELLEY v. MILAN*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. Ed. 85; *Welch v. Post*, 99 Ill. 471. But this power has often been specially conferred by statute, notably upon the city of Cincinnati to construct the Cincinnati Southern Railway outside of Ohio. See, also, *Nichol v. Nashville*, 9 Humph. (Tenn.) 252.

⁵⁵ 1 Dill. Mun. Corp. § 161.

⁵⁶ *CLARK v. DES MOINES*, 19 Iowa, 199, 87 Am. Dec. 423; *Louisiana State Bank v. Navigation Co.*, 8 La. Ann. 294.

⁵⁷ *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *Parsons v. Monmouth*, 70 Me. 262; *Cheaney v. Brookfield*, 60 Mo. 53; *State Board of Education v. Aberdeen*, 56 Miss. 518; *City of Chicago v. Fraser*, 60 Ill. App. 404.

⁵⁸ 1 Dill. Mun. Corp. §§ 242, 259, 270.

mal execution of the memorandum or indenture of contracts is usually committed to the mayor and recorder or other appropriate executive officer,⁵⁹ but in the larger cities the power to make and execute municipal contracts is usually conferred upon special boards, bureaus, or officers having special authority and superintendence over particular corporate functions and matters.⁶⁰ With regard to these the fundamental rule is that such boards, bureaus, and officers are special agents only, and have no power to make contracts binding upon the municipality outside the limitation of their particular functions.⁶¹ Moreover, persons contracting with the municipality are bound to take notice of the limits of the agent's authority;⁶² and a contract made by a public agent within the apparent scope of his powers does not bind his principal in the absence of actual authority.⁶³ But if the contract is made by the common council as general agent of the municipality, and within the scope of the corporate powers, express or implied, the authority as

⁵⁹ *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

⁶⁰ *People v. Town*, 1 App. Div. 127, 37 N. Y. Supp. 864; *Elliott, Mun. Corp.* § 252.

⁶¹ *New Decatur v. Berry*, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827; *City of St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; *Bonesteel v. Mayor*, 22 N. Y. 162; *Hudson v. Marietta*, 64 Ga. 286; *Starkey v. Minneapolis*, 19 Minn. 203 (Gil. 166); *Gates v. Hancock*, 45 N. H. 528; *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736.

⁶² *State v. Railway Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *Parsel v. Barnes*, 25 Ark. 261; *Kerr v. Bellefontaine*, 59 Ohio St. 446, 52 N. E. 1024; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa. 250, 90 N. W. 746. Persons contracting with a municipal corporation are bound to know whether the municipality has power to make such contract. *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588; *Raton Waterworks Co. v. Raton*, 9 N. M. 70, 49 Pac. 898.

⁶³ *Hodges v. Buffalo*, 2 Denio (N. Y.) 110; *Rensselaer County Sup'rs v. Bates*, 17 N. Y. 242; *Tippecanoe Co. v. Cox*, 6 Ind. 403; *Trustees of Belleview v. Hohn*, 82 Ky. 1; *Willoughby v. City Council*, 51 S. C. 462, 29 S. E. 242; *Town of Madison v. Newsome*, 39 Fla. 149, 22 South. 270; *Kerr v. Bellefontaine*, *supra*; *Bardaley v. Sternberg*, 17 Wash. 243, 49 Pac. 499.

agent may be presumed.⁶⁴ The municipality is not bound by the erroneous opinion or false representation of the agent with regard to his authority;⁶⁵ and it has been held that the presumption of his authority will not be indulged, nor will the contract be made binding from the mere silence or acquiescence of the citizens or the common council of a municipality.⁶⁶

Ratification.

The same rules apply to ratification as to the making of contracts. No supposed ratification of an unauthorized municipal contract is binding unless such ratification is made by the municipal agency authorized to make such contract.⁶⁷ And accordingly it has been held that where a mayor assents to a compromise of a pending suit against the city, ratifying the contract sued upon, which is entered upon the minutes of court and the suit thereupon dismissed, this formal ratification does not bind the municipality, because the mayor had no authority either to make or ratify such contract.⁶⁸ The power to ratify belongs generally to the common council, but it may be made by the particular municipal agency having power to make the original contract.⁶⁹

⁶⁴ This presumption results from the fact of the general authority of the council to execute all contractual powers of the municipality, not expressly withheld from it, and conferred upon special agencies.

⁶⁵ *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *MINERS' DITCH CO. v. ZELLERBACH*, 37 Cal. 543, 99 Am. Dec. 300; *City of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Farnsworth v. Pawtucket*, 13 R. I. 82; *Overseers of Poor of Norwich v. Pharsalia*, 15 N. Y. 341; *Inhabitants of Congressional Tp. No. 11 v. Weir*, 9 Ind. 224; *Trustees of Belleview v. Hohn*, 82 Ky. 1.

⁶⁶ *Loker v. Brookline*, 13 Pick. (Mass.) 343; *Allegheny City v. McClurkan*, 14 Pa. 81. But see *Rogers v. Burlington*, 3 Wall. (U. S.) 654, 672, 18 L. Ed. 79; *Bissell v. Jeffersonville*, 24 How. (U. S.) 300, 16 L. Ed. 664; *State v. Van Horne*, 7 Ohio St. 331; *Butler v. Dunham*, 27 Ill. 477.

⁶⁷ 1 Dill. Mun. Corp. § 465.

⁶⁸ *Jackson Electric Ry., Light & Power Co. v. Adams*, 79 Miss. 408, 30 South. 694; *City of Tyler v. Adams* (Tex.) 62 S. W. 119.

⁶⁹ *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *HAGUE v. PHILA-*

MODE OF CONTRACTING.

- 101. Wherever the mode of negotiating and executing a municipal contract is plainly and specially prescribed and limited, such mode is exclusive and must be substantially pursued; else the municipality will not be bound by the contract.**

Explicit restrictions and directions as to the manner of negotiating and executing municipal contracts are generally to be found in municipal charters or the statutes authorizing particular contracts. These provisions are inserted as safeguards against public extravagance and private greed. A few cases have held such instructions to be directory only,⁷⁰ but the great body of the decisions concur in declaring such statutory directions as to the method and form of negotiating and executing municipal contracts to be mandatory and peremptory.⁷¹ The language of Chief Justice Marshall on this subject has met with general judicial approval: "The act of incorporation is to become an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes

DELPHIA, 48 Pa. 527; *MARSH v. FULTON COUNTY*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32.

⁷⁰ *Kelley v. Mayor*, 4 Hill (N. Y.) 263; *Maddox v. Graham*, 2 Metc. (Ky.) 56.

⁷¹ *City of Goldsboro v. Moffett*, 49 Fed. 213; *McDONALD v. MAYOR*, 68 N. Y. 23, 23 Am. Rep. 144; *Zottman v. City and County of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *City of Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637; *Carron v. Martin*, 26 N. J. Law, 594, 69 Am. Dec. 584; *Littlefield v. Railroad Co.*, 146 Mass. 268, 15 N. E. 648; *Montgomery County v. Barber*, 45 Ala. 237; *City of Terre Haute v. Lake*, 43 Ind. 480; *State v. Marion County*, 21 Kan. 419; *Francis v. Troy*, 74 N. Y. 338; *City of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *White v. New Orleans*, 15 La. Ann. 667; *Terhune v. Passaic*, 41 N. J. Law, 90; *Moreland v. Same*, 63 N. J. Law, 208, 42 Atl. 1058; *FULTON v. LINCOLN*, 9 Neb. 358, 2 N. W. 724; *Town of Durango v. Pennington*, 8 Colo. 257, 7 Pac. 14; *Worthington v. Covington*, 82 Ky. 265.

to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."⁷² Modern decisions have established the law to be that contracts of municipal corporations need not be under seal unless the charter or other legislative enactment so requires;⁷³ and so it has been held that a municipality may be bound to a contract by ordinance or by a resolution of the common council,⁷⁴ or even by parol agreement made through a duly authorized agency.⁷⁵

LETTING OF CONTRACTS.

102. The mode of letting a municipal contract is usually prescribed by the legislature, and, as we have seen, must be pursued.

The statutes and charters, though varied in phraseology, generally contain requirements that the letting shall be upon previous advertisement, and sealed bids based on plans and specifications, and to the lowest responsible bidder.

Upon these subjects a vast amount of litigation has occurred, and the reported adjudications are numerous and not altogether consistent. The general result of these adjudica-

⁷² *Head v. Insurance Co.*, 2 Cranch (U. S.) 127, 2 L. Ed. 229.

⁷³ 1 Dill. Mun. Corp. § 450, citing *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812; *Halbut v. Forrest City*, 34 Ark. 246. See, also, *Sheffield School Tp. v. Andress*, 56 Ind. 157; *City of Gadsboro v. Moffett*, 49 Fed. 213; *Trustees of Alabama University v. Moody*, 62 Ala. 389; *Merrick v. Plank Road*, 11 Iowa, 75; *Clark v. Washington*, 12 Wheat. (U. S.) 40, 6 L. Ed. 544; *Ross v. Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Fleckner v. President*, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; *Over v. Greenfield*, 107 Ind. 231, 5 N. E. 872.

⁷⁴ *FANNING v. GREGOIRE*, 16 How. (U. S.) 524, 14 L. Ed. 1043; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

⁷⁵ *Duncombe v. Ft. Dodge*, 38 Iowa, 281; *Reed v. Orleans*, 1 Ind. App. 25, 27 N. E. 109; *Clark v. Washington*, 12 Wheat. (U. S.) 40, 6 L. Ed. 544. See *Jackson Electric Ry., Light & Power Co. v. Adams*, 79 Miss. 408, 30 South. 694.

tions upon the various points is: (1) That publication must be made substantially as prescribed,⁷⁶ though it has been held that in case of emergency, where delay would work irreparable injury to the municipality, a bona fide contract free from fraud and favoritism, and at a reasonable price, was valid without preliminary advertisement.⁷⁷ (2) That plans and specifications for the contract may be either published in the advertisement or referred to as on file in a particular office, or to be furnished on application.⁷⁸ If published, the city is bound by the terms of the publication, and bids made thereupon are valid. So, also, of copy furnished on application.⁷⁹ If referred to as on file, they must be filed within a reasonable time before closing of bids, so as to allow reasonable time for examination, and thereby insure competition among bidders.⁸⁰ A requirement that material be manufactured by a particular firm is invalid,⁸¹ and, where new material is advertised for, secondhand material cannot be accepted.⁸² (3) That bids must remain sealed until the day specified for opening them, to the end that the municipality may have the benefit of fair

⁷⁶ *McCloud v. Columbus*, 54 Ohio St. 439, 44 N. E. 95; *Fairbanks, Morse & Co. v. North Bend* (Neb.) 94 N. W. 537; *Board of Sup'rs of Leflore County v. Cannon*, 81 Miss. 334, 33 South. 81; *Inge v. Board*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20.

⁷⁷ *North River Electric Light & Power Co. v. New York*, 48 App. Div. 14, 62 N. Y. Supp. 726.

⁷⁸ *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397. See *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *New Castle v. Rearic*, 18 Pa. Super. Ct. 350.

⁷⁹ *Moreland v. Passaic*, 63 N. J. Law, 208, 42 Atl. 1058.

⁸⁰ *Smith v. Syracuse*, 17 App. Div. 63, 44 N. Y. Supp. 852; *California Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802 (Necessity of competition); *Rose v. Low*, 85 App. Div. 461, 83 N. Y. Supp. 598; *Fairbanks, Morse & Co. v. North Bend* (Neb.) 94 N. W. 537; *Warren v. Boston*, 181 Mass. 6, 62 N. E. 951.

⁸¹ *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Burgess v. Jefferson*, 21 La. Ann. 143; *Smith v. Improvement Co.*, 161 N. Y. 484, 55 N. E. 1077. Contra, *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185.

⁸² *Lake Shore Foundry Co. v. Cleveland*, 8 Ohio Cir. Ct. R. 671.

competition among the bidders;⁸⁶ that all bids must be on file within the time limited by the advertisement,⁸⁴ and must be publicly opened at the place, and by the officer, prescribed by statute, or in charge of the biddings;⁸⁵ and also at the date prescribed, unless unavoidably delayed, in which case notice of the adjourned time for opening bids shall be given to the bidders.⁸⁶ A requirement of the full name of all persons interested in the bid is mandatory, and bids not conforming thereto must be rejected.⁸⁷ (4) That, where the advertisement promises a contract to the lowest bidder, the authority in control of the biddings may reject all bids unless otherwise peremptorily directed by the charter,⁸⁸ and no right of action will lie against the city for anticipated profits of the contract.⁸⁹

⁸⁴ *People v. Coler*, 35 App. Div. 401, 54 N. Y. Supp. 785.

⁸⁵ *Williams v. Bergin*, 129 Cal. 461, 62 Pac. 59; *Addis v. Pittsburgh*, 55 Pa. 379; *City of Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483; *Fairbanks, Morse & Co. v. North Bend (Neb.)* 94 N. W. 537.

⁸⁶ *People v. Coler*, *supra*. Where the statute requires that the bids be publicly opened by the officer advertising for them, a street commissioner advertising for bids for public improvements being absent from his office at the time set for opening them, the opening of the bids by his secretary is a nullity. *City of Newport News v. Potter*, *supra*.

⁸⁷ *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108; *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432.

⁸⁸ *Strack v. Ratterman*, 18 Ohio Cir. Ct. R. 36. And so also it has been held that a provision that contracts for public improvements shall be let to the lowest responsible bidder, is mandatory. *Inge v. Board*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20. But see *Brown v. Houston (Tex. Civ. App.)* 48 S. W. 760.

⁸⁹ *Elliot v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081; *Brown v. Houston*, *supra*. Cf. *State v. Payssan*, 47 La. Ann. 1029, 17 South. 481, 49 Am. St. Rep. 390. See, also, *Trapp v. Newport*, 25 Ky. Law Rep. 224, 74 S. W. 1109; *Trowbridge v. Hudson*, 24 Ohio Cir. Ct. R. 76; *Corry v. Chair Co.*, 18 Pa. Super. Ct. 271; *People v. Kent*, 160 Ill. 655, 43 N. E. 760.

⁹⁰ *City Imp. Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776; *Talbot Paving Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 304.

Where the publication is for the lowest responsible bidder, discretion as to responsibility rests with the municipality;⁹⁰ but this discretion is not arbitrary,⁹¹ and the bidder is not to be selected as responsible because alone of the value of his property or his ability to pay money,⁹² but upon his ability to respond to the requirements of the contract.⁹³ And no right of action lies against the municipality or the officers in control of the bidding for an honest mistake in the exercise of this discretion.⁹⁴

⁹⁰ *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Erving v. Mayor*, 131 N. Y. 133, 29 N. E. 1101; *Johnson v. Sanitary Dist.*, 163 Ill. 283, 45 N. E. 213; *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Douglass v. Commonwealth*, 108 Pa. 559; *City of Chicago v. Hanreddy*, 102 Ill. App. 1; *Kundinger v. Saginaw (Mich.)* 93 N. W. 914; *St. Louis Quarry & Construction Co. v. Frost*, 90 Mo. App. 677; *Kronsbein v. Rochester*, 76 App. Div. 494, 78 N. Y. Supp. 813.

⁹¹ *McGovern v. Board*, 57 N. J. Law, 580, 31 Atl. 613; *People v. Kent*, 160 Ill. 655, 43 N. E. 760; *People v. Common Council*, 78 N. Y. 33, 34 Am. Rep. 500. But the authority of the council to determine which is the lowest responsible bidder will not be interfered with by the court except it be shown clearly that there was fraud or collusion. *Hubbard v. Sandusky*, 9 Ohio Cir. Ct. R. 638.

⁹² *People v. Kent*, 160 Ill. 655, 43 N. E. 760.

⁹³ *Interstate Vitrified Brick & Paving Co. v. Philadelphia*, 164 Pa. 477, 30 Atl. 383. In *Inge v. Board*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20, it was held that, in deciding on the responsibility of the bidder, it is the duty of the municipal officers to consider not only the pecuniary ability of a bidder to perform the contract, but his skill and integrity. See *People v. Kent*, *supra*; *State v. St. Bernard*, 10 Ohio Cir. Ct. R. 74; *Neiman v. Same*, *Id.*, REUTING v. TITUSVILLE, 175 Pa. 512, 34 Atl. 916.

⁹⁴ *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Talbot Paving Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604.

ILLEGAL CONTRACTS.

- 103. Municipal contracts, like the contracts of private corporations and individuals, are also illegal and void whenever they are contrary to law, to public policy, or to good morals.**

The same causes which invalidate private contracts also destroy those made by municipal corporations. These causes need not be here enumerated. It will suffice to recall that any contract which involves matter that is *malum prohibitum* or *malum in se* is illegal. There are, however, certain grounds for impeaching municipal contracts which call for special mention because of their frequency and facility in municipal transactions.

Contracts with Officers.

As we have heretofore seen, it is a fundamental rule that aldermen and officers of a municipality must not make contracts with it.⁹⁵ This is a universal rule, unyielding in its application, and founded on the purest public policy.⁹⁶ It prohibits municipal contracts with private corporations in which members of the council may be interested.⁹⁷ Such contracts are said to be fraudulent in law, and hence illegal and

⁹⁵ Ante, § 82; *West v. Berry*, 98 Ga. 402, 25 S. E. 508; *Macy v. Duluth*, 68 Minn. 452, 71 N. W. 687.

⁹⁶ *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238; *American Emigrant Co. v. Wright County*, 97 U. S. 339, 24 L. Ed. 912.

⁹⁷ *Nunemacher v. Louisville*, 98 Ky. 334, 32 S. W. 1091; *Snipes v. Winston*, 126 N. C. 374, 35 S. E. 610, 78 Am. St. Rep. 686; *Santa Ana Water Co. v. San Buenaventura (C. C.)* 65 Fed. 323; *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265; *Pelper v. Same, Id.*; *Finch v. Railroad Co.*, 87 Cal. 597, 25 Pac. 765; *Bellaire Goblet Co. v. Findlay*, 5 Ohio Cir. Ct. R. 418; *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Milford v. Water Co.*, 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122; *Foster v. Cape May*, 60 N. J. Law, 78, 36 Atl. 1089; *Commonwealth v. De Camp*, 177 Pa. 112, 35 Atl. 601.

void.⁹⁸ This has been so ruled of a contract with an attorney who was an alderman;⁹⁹ and of a contract made with an electric light company, a share of stock of which was pledged to an alderman;¹⁰⁰ and so also of a contract for horses and carriages, to be used in a celebration, made with a liveryman who was an alderman.¹⁰¹

Against Public Policy.

A promise to pay a public corporation or its agents a premium for doing their duty is illegal and void.¹⁰² "A contract will not be sustained which tends to restrain or control the unbiased judgment of public officers;"¹⁰³ and so of a promise by a city to surrender its right to lay out a street, it being contrary to public policy and void, as abdicating a public function;¹⁰⁴ also of a contract binding the city authorities not to exercise their legislative powers in a certain manner in the future;¹⁰⁵ and a contract to employ "none but union labor,"¹⁰⁶ or to buy only such articles as have a union label";¹⁰⁷ so of one repugnant to the result of a municipal referendum.¹⁰⁸

⁹⁸ 1 Dill. Mun. Corp. § 444; Tied. Mun. Corp. § 167.

⁹⁹ West v. Berry, 98 Ga. 402, 25 S. E. 508.

¹⁰⁰ Foster v. Cape May, *supra*.

¹⁰¹ Smith v. Albany, 61 N. Y. 444. The trustees of gasworks of a city are "municipal officers," within the meaning of the term relating to municipal officers making contracts with firms of which they are members. State v. Funk, 16 Ohio Cir. Ct. R. 155. See, also, Marshall v. Ellwood, 189 Pa. 348, 41 Atl. 994; Macy v. Duluth, 68 Minn. 452, 71 N. W. 687; Moreland v. Passaic, 63 N. J. Law, 208, 42 Atl. 1058; Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049.

¹⁰² CITY OF INDIANAPOLIS v. GASLIGHT CO., 66 Ind. 396.

¹⁰³ 1 Dill. Mun. Corp. § 458.

¹⁰⁴ MARTIN v. MAYOR, 1 Hill (N. Y.) 545.

¹⁰⁵ State v. Railroad Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

¹⁰⁶ Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222.

¹⁰⁷ Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815; Adams v. Brenan, *supra*; Holden v. Alton, 179 Ill. 318, 53 N. E. 556; YICK WO v. HOPKINS, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Appeal of Durach, 62 Pa. 495.

¹⁰⁸ George v. Light Co., 105 Mich. 1, 62 N. W. 985.

Contrary to Law.

A contract in violation of a statute or constitution is also illegal and void;¹⁰⁹ and so where a fire apparatus exceeding five hundred dollars in value was purchased by a city, without referring the matter to a vote of the electors as required by statute, the contract was held void;¹¹⁰ as was likewise one which attempted to evade the statute by splitting the purchase price into parts less than five hundred dollars;¹¹¹ so, likewise, of contracts contrary to constitutional provisions limiting annual expenditures to annual revenues;¹¹² also to one requiring a sinking fund provision for indebtedness contracted.¹¹³ And so, likewise, a municipal contract obtained by means of a combination of contractors to prevent competition is illegal and void, not only as being contrary to statute, but also against public policy;¹¹⁴ and a municipal contract granting exclusive rights and franchises by a city, made otherwise than in the exercise of its police powers, is likewise illegal and void.¹¹⁵ But the grant of a franchise for water and light plants for a term of years is not a monopoly;¹¹⁶ nor is a contract for the exclusive right to clear and dispose of garbage of a city an illegal monopoly.¹¹⁷

¹⁰⁹ *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *City of Covington v. McKenna*, 99 Ky. 508, 36 S. W. 518; *Noel v. San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263; *Continental Const. Co. v. Altoona*, 92 Fed. 822, 35 C. C. A. 27; *Citizens' Water Co. v. Hydraulic Co.*, 55 Conn. 1, 10 Atl. 170.

¹¹⁰ *Fire Extinguisher Mfg. Co. v. Perry*, 8 Okl. 429, 58 Pac. 635.

¹¹¹ *Fire Extinguisher Mfg. Co. v. Perry*, *supra*; *Raton Waterworks Co. v. Raton*, 9 N. M. 70, 49 Pac. 898.

¹¹² *Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912.

¹¹³ *Noel v. San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263.

¹¹⁴ *Brady v. Bartlett*, 56 Cal. 350.

¹¹⁵ *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547.

¹¹⁶ *Altgelt v. San Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383; *City of Brenham v. Water Co.*, 67 Tex. 545, 4 S. W. 143.

¹¹⁷ *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *State v. Orr*, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

ANNULLING CONTRACTS.

104. A municipality has no power to arbitrarily annul its contracts, but may renounce, terminate, or rescind them only on the same terms and under the same conditions as other contracting parties.

Municipal contracts are held to be made in the exercise of municipal rather than governmental powers.¹¹⁸ The contracting parties, are equal before the law, both as regards the making and performance of the contract, and each has the same right and remedy as the other.¹¹⁹ The city, therefore, possesses no power of annulling its contracts in virtue of its public character.¹²⁰ The analogy of the law of private corporations is generally recognized as controlling in such matters.¹²¹ Where the right to annul or terminate the contract is reserved to either party because of nonperformance by the other, or any similar express condition, it may be exercised in the mode and with the effect stipulated in the contract.¹²² Otherwise the rescinding party must rely upon recognized equitable or legal grounds for such proceeding;¹²³ and, if

¹¹⁸ *City of Greenville v. Waterworks Co.*, 125 Ala. 625, 27 South. 764; *Rae v. Flint*, 51 Mich. 528, 16 N. W. 887; *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 458; *City of Indianapolis v. Coke Co.*, 66 Ind. 396.

¹¹⁹ *Little Falls Electric & Water Co. v. Little Falls (C. C.)* 102 Fed. 663; *Parr v. Greenbush*, 42 Hun (N. Y.) 232; *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671; *City of Galveston v. Loonie*, 54 Tex. 517.

¹²⁰ *Hudson Electric Light Co. v. Hudson*, 163 Mass. 346, 40 N. E. 109; *Newport v. Phillips*, 19 Ky. Law Rep. 352, 40 S. W. 378; *Portland Lumbering & Mfg. Co. v. East Portland*, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; *United States Waterworks Co. v. Du Bois*, 176 Pa. 439, 35 Atl. 251; *Wells v. Atlanta*, 43 Ga. 67.

¹²¹ *Newport v. Phillips*, 19 Ky. Law Rep. 352, 40 S. W. 378; *Portland Lumbering & Mfg. Co. v. East Portland*, *supra*; *Pullman v. Mayor*, 54 Barb. (N. Y.) 169.

¹²² *Bietry v. New Orleans*, 24 La. Ann. 21; *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573.

¹²³ *Newport v. Phillips*, 19 Ky. Law Rep. 352, 40 S. W. 378. A

the city assume arbitrarily to terminate or renounce its contract, it subjects itself thereby to the usual legal consequences of a breach of contract.¹²⁴ But it may, like any other party, compromise or arbitrate the matters in controversy.¹²⁵

IMPAIRING OBLIGATIONS.

105. A municipal contract cannot be impaired by state legislation.

Legislative control over municipal powers, and even municipal existence, as we have seen,¹²⁶ is unlimited. It can create, direct, control, modify, and destroy the municipality; but it can pass no law impairing the obligations of a municipal contract.¹²⁷ Says the Supreme Court of the United States:¹²⁸

modification of a contract by a city, or a waiver of conditions therein, found to be prejudicial to its interests, may be made by implication. *City of Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483.

¹²⁴ *Jones v. Richmond*, 18 Grat. (Va.) 517, 98 Am. Dec. 695; *City of Williamsport v. Commonwealth*, 84 Pa. 487, 24 Am. Rep. 208; *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 485.

¹²⁵ *Ford v. Clough*, 8 Greenl. (Me.) 334, 23 Am. Dec. 513; *Colburn v. Welch*, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111; *Inhabitants of Griswold v. Stonington*, 5 Conn. 367; *Town of Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Dec. 501. But not in the exercise of eminent domain. *City of Somerville v. Dickerman*, 127 Mass. 272; *McCann v. Otoe County*, 9 Neb. 324, 2 N. W. 707.

¹²⁶ Ante, §§ 63, 70.

¹²⁷ *United States v. County Treasurer*, 1 Dill. 522, Fed. Cas. No. 16,538; *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699; *People v. Bond*, 10 Cal. 563; *SHAPLEIGH v. SAN ANGELO*, 167 U. S. 654, 17 Sup. Ct. 957, 42 L. Ed. 310; *CITY OF MEMPHIS v. UNITED STATES*, 97 U. S. 293, 24 L. Ed. 920; *Morris v. State*, 62 Tex. 728; *Smith v. Appleton*, 19 Wis. 468; *UNITED STATES v. NEW ORLEANS*, 103 U. S. 358, 26 L. Ed. 395; *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *SEIBERT v. LEWIS*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

¹²⁸ *UNITED STATES v. NEW ORLEANS*, supra. See, also, *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793.

"Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principles which secure the inviolability of contracts." The remedy of the contractor in case of repeal of a charter and dissolution has received consideration in preceding sections.¹²⁹

MONEY CONTRACTS.

106. The inherent or implied power of a municipal corporation to borrow money and execute negotiable paper or municipal bonds therefor is an unsettled point of municipal law in America, a majority of the cases seeming to recognize the existence of that municipal power, while the weight of the reasoning denies it except where expressly conferred.

A synopsis of the law upon this subject as applied to quasi corporations will be found in a preceding chapter,¹³⁰ and the doctrines and rules therein laid down as to county bonds will be found generally applicable to municipal bonds. Repetition

¹²⁹ Ante, p. 167, § 51.

¹³⁰ Ante, §§ 23, 24.

is therefore unnecessary here. The distinction between the powers of municipal and quasi corporations to borrow money and execute negotiable securities therefor will be found to lie in the different nature of the two classes of corporations, the latter being exclusively public and governmental,¹³¹ while the former possesses powers and rights of a quasi private nature, usually denominated "strictly municipal."¹³² In view of these strictly municipal and quasi private rights and powers of a municipal corporation, the majority of the American courts have been inclined to recognize in municipal corporations the same inherent or implied powers to borrow money and make negotiable paper as are committed to private corporations.¹³³ Judge Dillon has made an earnest protest against the concession of this implied or inherent power to municipal corporations,¹³⁴ which was based upon opinions of the Supreme Court of the United States, especially that of Mr. Justice Bradley, in the Nashville Case,¹³⁵ and which has received support from the supreme courts of several states,¹³⁶ and it seems likely to become the prevailing doctrine of the

¹³¹ Ante, §§ 5, 9, 34.

¹³² Ante, § 34.

¹³³ *De Voss v. Richmond*, 18 Grat. (Va.) 338, 98 Am. Dec. 647; *Bank of Chillicothe v. Chillicothe*, 7 Ohio 31, pt. 2, 30 Am. Dec. 185; *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *State v. Babcock*, 22 Neb. 614, 35 N. W. 941; *City of Richmond v. McGirr*, 78 Ind. 192; *City of Kenosha v. Lamson*, 9 Wall. (U. S.) 477, 19 L. Ed. 725; *Stratton v. Allen*, 16 N. J. Eq. 229; *Davis v. Meeting House*, 8 Metc. (Mass.) 321; *CITY OF NASHVILLE v. RAY*, 19 Wall. (U. S.) 468, 22 L. Ed. 164; *City of Williamsport v. Commonwealth*, 84 Pa. 497, 24 Am. Rep. 208; *Williamson County v. Farson*, 101 Ill. App. 328; *City of Huron v. Bank*, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; *Robertson v. Breedlove*, 61 Tex. 316. Contra, *Coquard v. Oquawka*, 192 Ill. 355, 61 N. E. 660; *Village of Oquawka v. Graves*, 82 Fed. 568, 27 C. C. A. 327; *Lovejoy v. Foxcroft*, 91 Me. 367, 40 Atl. 141.

¹³⁴ 1 Dill. Mun. Corp. §§ 121-126.

¹³⁵ *CITY OF NASHVILLE v. RAY*, 19 Wall. (U. S.) 468, 22 L. Ed. 164.

¹³⁶ *Swackhamer v. Hackettstown*, 37 N. J. Law, 191; *Hewitt v. School Dist.*, 94 Ill. 528; *Thomas v. Port Huron*, 27 Mich. 320.

American courts, though it has not as yet been so expressly declared. The weight of his personal opinion as an author on municipal law is so generally recognized by lawyers and judges as to warrant the adoption here of his views as to points where the American cases are conflicting and cannot be harmonized.¹⁸⁷ Concisely stated, they are as follows: ¹⁸⁸

(1) Municipal expenses are based upon municipal revenues, and the power to borrow money as a means of making future improvements or meeting current expenses cannot be implied from the mere authority to make such improvements, nor from the usual grants of municipal power.

(2) The nature of the usual functions of a municipality is so widely different from that of a private corporation as not to warrant the use of analogy to determine the inherent powers of the municipality as to borrowing money and issuing commercial paper.

(3) The power to issue negotiable paper, unimpeachable in the hands of the holder, is not an inherent or implied power of a municipal corporation.

(4) Power to issue negotiable paper may be properly inferred from the express power to borrow money granted to a municipality.

(5) Municipal paper negotiable in form, if issued by a public corporation required to audit all claims and issue to the creditor warrants or orders therefor, is subject to all legal and equitable defenses in the hands of a transferee, as of the original holder. And the same rule prevails where the municipality may make and create debts and issue evidences of liability thus incurred, unless it has express or clearly implied power to issue negotiable paper.

¹⁸⁷ *Uncas Nat. Bank v. Superior*, 115 Wis. 340, 91 N. W. 1004; *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; *Lehman v. San Diego (C. C.)* 73 Fed. 105; *Coquard v. Oquawka*, 192 Ill. 355, 81 N. E. 660; *Lovejoy v. Foxcroft*, 91 Me. 367, 40 Atl. 141. See note 5, c. 1.

¹⁸⁸ 1 Dill. Mun. Corp. § 125.

CHAPTER XIII.**IMPROVEMENTS.**

- 107, 108. **Municipal Improvements—General—Local.**
- 109. **Power to Make or Aid.**
- 110. **Preliminary Proceedings.**
- 111. **Contracts.**
- 112. **Damages.**
- 113. **Special Assessments.**
- 114. **Enforcing Collection.**

MUNICIPAL IMPROVEMENTS—GENERAL—LOCAL.

- 107. **Municipal improvements include all those additions to or changes in the municipal property, made by the use of money and labor or skill, for the purpose and with the effect of enhancing taxable values or ameliorating conditions of life in the municipality.**
- 108. **They are necessarily public, but may be either local, as conferring special benefits upon a certain street, block, or section; or general, as bettering the entire municipality. The latter are generally paid for out of the municipal treasury, the former by local taxation.**

The chief object of citizens in effecting municipal organization is the amelioration of urban conditions. Physical change follows close upon the preservation of social order. An urban population requires special provisions for its comfort and well-being not necessary in rural districts. They are such as will preserve health, facilitate locomotion, and generally promote the convenience of the citizens. Each proprietor may care for his own property in his own way, but for the public comfort and the general convenience of the inhabitants provision must be made in accordance with plans which usually approximate urban ideals. To accomplish these purposes, improvements are necessary. Streets must be laid out, graded,

curbed, guttered, paved, and lighted; sidewalks must be laid; municipal buildings must be erected; water must be furnished; sewers constructed; and in these times electric plants are coming into municipal use to furnish not only light, but power, for municipal purposes. Parks, also, are urban necessities, and boulevards contribute greatly not only to the beauty, but the health, of a city. And, since most cities are situate upon navigable waters, docks and wharves are necessities for their trade and commerce. Nor are public schoolhouses, halls, hospitals, and auditoriums to be omitted. The construction and care of all these things properly pertain to a modern municipality, and they are embraced within the comprehensive term "improvements," whether they are general in their nature, for the common use of all the citizens, or, by reason of being local, afford special benefits and advantages to citizens owning property or living in a particular locality.¹

POWER TO MAKE OR AID.

109. The power to make general improvements is inherent in every municipality; but the power to make local improvements at the expense of the locality must be conferred expressly by the charter or by statute, or plainly implied.

The general amelioration of urban conditions is the paramount object of municipal incorporation.² To devise and

¹ 2 Beach, Pub. Corp. § 1170; Elliott, Mun. Corp. § 115; 2 Dill. Mun. Corp. § 761. See, also, *Carthage v. Light Co.*, 97 Mo. App. 20, 70 S. W. 936; *Riverside & A. Ry. Co. v. Riverside* (C. C.) 118 Fed. 736; *Taylor v. Patton*, 160 Ind. 4, 68 N. E. 91; *Scott v. La Porte* (Ind. Sup.) 68 N. E. 278. A city has implied power to light its streets and public buildings and places, and may do so by the erection of plants. *Fawcett v. Mt. Airy* (N. C.) 45 S. E. 1029, 63 L. R. A. 870.

² Authority given to a city to provide for the extension or construction of sewers carries with it implied power to make a general contract therefor. *Jones v. Holzapfel*, 11 Okl. 405, 68 Pac. 511;

execute plans to attain this object is an essential function of the municipality. For the performance of this municipal function the city obviously possesses the requisite inherent power. It is not necessary, therefore, that the power to make any of these necessary municipal improvements for the general welfare shall be expressly conferred by charter; the city has it—must have it—to protect and promote the health, happiness, and well-being of its citizens.³

Extraordinary Improvements.

But to exercise this power, to perform this function, in an extraordinary way, or to incur extraordinary expenses therefor, express authority is generally required.⁴ For instance, a city not only may, but must, take proper care of its streets and alleys; and this it may do, at an expense within the limit of its annual revenues appropriated to that purpose, without express charter authority.⁵ It may also, without express

Elliott, Mun. Corp. § 76; *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561; *City of Galveston v. Loonie*, 54 Tex. 517; *Wells v. Atlanta*, 43 Ga. 67.

³ *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725. 60 Am. Rep. 130; *Cooley, Const. Lim.* (6th Ed.) 231; *Village of Carthage v. Frederick*, 122 N. Y. 271, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490; *Ould v. Richmond*, 23 Grat. (Va.) 464, 14 Am. Rep. 139. But no express authority is necessary to be given to a city, it having implied authority, to require lot owners to lay sidewalks in front of their property, such improvement being considered a convenience pertinent to the lot, valuable as well to the lot as to the general public; and when a lot owner fails to make such improvement, when notified to do so, the city may do the work, or have it done, and collect the cost thereof from the property owner. *City of Pittsburgh v. Daly*, 5 Pa. Super. Ct. 528.

⁴ *Town of Drummer v. Cox*, 165 Ill. 648, 46 N. E. 716; *HILL v. MEMPHIS*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887; *MERRILL v. MONTICELLO*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; *MAYOR v. RAY*, 19 Wall. (U. S.) 468, 22 L. Ed. 164; *Sturtevant v. Alton*, 3 McLean, 393, Fed. Cas. No. 13,580.

⁵ In *re Opening First Street*, 66 Mich. 42, 33 N. W. 15; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314. In *City of Detroit v. Railway* (Mich.) 95 N. W. 736, it was held that a city had authority to bind

grant of power therefor, contract with a gas or electric company to provide light for the city; * but if an extensive scheme of grading and paving at great expense is to be entered upon, requiring more than the annual revenues, and thereby incurring large municipal indebtedness, or if, at large expense and by municipal loan, the city wishes to construct its own gas or electric plant, it must have express legislative authority therefor.⁷

Local Improvements.

Local improvements are special improvements in a particular locality, and for the special benefit thereof, and as such are chargeable to the property holders of the locality.⁸ Such improvements are not made in the exercise of the usual municipal functions, nor paid for out of the general municipal exchequer. They require an extraordinary exercise of municipal power, and lay unusual and exceptional burdens upon the property of the locality, and thus apparently violate the rule of equal taxation. For example, a certain street or avenue is converted into a boulevard, and the expense thereof charged to the abutting property owners. This is not an inherent power of a municipal corporation; the performance of such an extraordinary function requires express authority.⁹

itself on contract and maintain at its own expense the foundation required in its streets for the support of street car tracks.

* CITY OF INDIANAPOLIS v. COKE CO., 66 Ind. 396; Gregory v. Bridgeport, 41 Conn. 76, 19 Am. Rep. 458; Pullman v. Mayor, 54 Barb. (N. Y.) 169.

⁷ Scott v. Davenport, 34 Iowa, 208; Hewitt v. School Dist., 94 Ill. 528; Hill v. Memphis, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887; Elliott, Mun. Corp. § 113. A contract for a street improvement, made before the adoption of a sufficient ordinance therefor, is invalid. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

⁸ Cooley, Tax'n, p. 606; Burrough, Tax'n, p. 460.

⁹ Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Lott v. Ross, 38 Ala. 156; Winston v. Taylor, 99 N. C. 210, 6 S. E. 114; City of Savannah v. Hartridge, 8 Ga. 23; Green v. Ward, 82 Va. 324. An

PRELIMINARY PROCEEDINGS.

110. It is essential to the validity of any scheme of improvement that all the substantial requirements of the charter or statute authorizing the same shall be strictly observed and complied with.

Municipal repairs or slight improvements made within the limits of ordinary revenues are not generally considered to be included within the meaning of the term "improvements."¹⁰ This word is usually employed to describe such local or thorough changes in physical conditions as involve extraordinary expenditure or unusual taxation,¹¹ and will be so used in this chapter. The authority of the municipality to impose these special or extraordinary burdens may be conferred upon it by the charter, by general law, or by special legislation. It is rarely an absolute power, but is usually conditioned upon the assent of those to be burdened by the proposed improvement.¹² If it is general, the assent is required to be manifested by a popular election showing the favor of a bare majority or two-thirds or three-fourths of the entire vote cast, or of all entitled to vote in the election.¹³ If it is a local improvement, the condition precedent may be either a petition for the improvement, generally required to be signed by a majority of all freeholders to be affected thereby;¹⁴ or a judicial declaration

ordinance is the very foundation of the improvement, when it is to be paid for by a special tax, and no special tax can be levied for improvements already made. *City of Alton v. Job*, 103 Ill. App. 378.

¹⁰ *Philadelphia v. Dibeler*, 147 Pa. 261, 23 Atl. 567; *In re Fulton Street*, 29 How. Prac. (N. Y.) 429.

¹¹ 2 Beach, Pub. Corp. c. 27; Elliott, Mun. Corp. §§ 113-117.

¹² 2 Smith, Mun. Corp. § 1131.

¹³ *Marion Water Co. v. Marion* (Iowa) 96 N. W. 883.

¹⁴ *Jones v. South Omaha* (Neb.) 94 N. W. 957. In *Orr v. Omaha* (Neb.) 90 N. W. 301, it was held that where the act incorporating metropolitan cities authorized any such city to pave any street or alley within its limits, either with or without a petition of the property

by some court, upon a special proceeding for that purpose, upon the petition of some interested person;¹⁵ or a notice, duly published or posted, warning those interested of the nature and extent of the proposed improvement, and inviting them to show cause before the common council, either orally or in writing, why it should not be made.¹⁶

Essential Prerequisites.

The obvious purpose of all these requirements is to gain the assent of those interested. Some of them absolutely prevent taxation without popular consent, others without consent of those to be taxed, and others, in analogy to judicial proceeding, recognize the right of the parties interested to be heard in their own behalf. To some degree the right of home rule is recognized in all of them. In harmony with the legislative intention are the decisions of the courts to the effect that

owners representing a majority of the feet frontage, the city had no authority to make the cost of paving a charge against the abutting property without a petition of the owners of such property. But in the same case it was held that the city could, under the same provision, when it had ordered a street paved, curb and gutter the same, and make the expense thereof a legal charge upon the abutting real estate, though there was no petition for such improvement. See *New Iberia v. Fontellieu*, 108 La. 460, 32 South. 369; *Taylor v. Patton*, 160 Ind. 4, 66 N. E. 91; *Board of Improvement Dist. No. 60 v. Cotter* (Ark.) 76 S. W. 552. And under a statute authorizing street paving to be done "when the person owning real estate which has at least one-third fronting on the street, the improvement of which is desired, shall request the commissioners to make such improvement," the city cannot, as an owner of property fronting on such street, join in signing such request, in order to make the same come up to the legal requirement. *City of Atlanta v. Smith*, 99 Ga. 462, 27 S. E. 696.

¹⁵ Gen. St. Conn. 1888, §§ 2706, 2715.

¹⁶ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774; *Peck v. Bridgeport*, 75 Conn. 417, 53 Atl. 893; *Gray v. Burr*, 138 Cal. 109, 70 Pac. 1068; *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023; (notice) *Bank Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112; *Brown v. Central Bermudez Co.* (Ind. Sup.) 69 N. E. 150; *Adams v. Roanoke* (Va.) 45 S. E. 881; 2 *Smith, Mun. Corp.* § 1130.

these statutory provisions are conditions precedent to the exercise of the taxing power delegated to the municipality for purposes of improvement, and that the omission or failure to observe and comply with them renders invalid any effort of the municipality to make the improvement. These provisions are held to be mandatory, and compliance with them is absolutely essential to the exercise of the power.¹⁷

Strict Construction.

The rule of strict construction is also applied to statutes giving this power of special or extraordinary taxation,¹⁸ and it has been accordingly held that a guardian of children cannot be counted to make a majority of property holders signing a petition;¹⁹ nor one of two joint tenants;²⁰ nor a life tenant.²¹ It has also been held that the names of property holders upon an original petition to the council, which had been laid upon the table, cannot be added to those subscribed to a subsequent petition for the same improvement in order to make a majority.²² Also, where the initiative is by the municipality, and notice is required, it must be given in writing;²³ and where publication is permitted the improve-

¹⁷ *People v. Smith*, 201 Ill. 454, 66 N. E. 298; *Morse v. Omaha* (Neb.) 93 N. W. 734; *BLANCHARD v. BISSELL*, 11 Ohio St. 96; *Missouri Pac. Ry. Co. v. Wyandotte*, 44 Kan. 32, 23 Pac. 950; *White v. Saginaw*, 67 Mich. 33, 34 N. W. 255; *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710.

¹⁸ *Merritt v. Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47; *Hoyt v. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

¹⁹ *Auditor General v. Fisher*, 84 Mich. 128, 47 N. W. 574.

²⁰ *Auditor General v. Fisher*, *supra*. But where the decision for the improvement is based upon the petition of the owners of a certain percentage in value of the property to be affected, and one of two partners signs the petition for such improvement, and the other does not, one-half of the value of the partnership property should be added in finding the total value of the property of the petitioners. *Earl v. Board*, 70 Ark. 211, 67 S. W. 312.

²¹ *City of Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028.

²² *Auditor General v. Fisher*, *supra*.

²³ *City of Cincinnati v. Sherike*, 47 Ohio St. 217, 25 N. E. 169.

ment must be specifically described;²⁴ and want of notice or insufficient notice invalidates the ordinance for the improvement.²⁵

Discretion of Council.

Where the council is vested with power to order and make the improvement, either upon petition or notice, and these formal requirements have been complied with, the power of the council is discretionary and quasi judicial, and its decision is conclusive in the absence of mistake or fraud;²⁶ and the courts will not interfere to prevent it because of alleged prodigality or inutility.²⁷ And where the council is authorized, either expressly or by fair implication, to determine whether a majority of property owners have requested the improvement, their action in ordering the improvement thereon is a conclusive determination of that question.²⁸ But where this jurisdiction is not conferred upon the council, then the courts may inquire and determine whether the majority have so petitioned.²⁹ In general, it may be said that all those provisions of the statute which look to the protection of sub-

²⁴ *Jenny v. Des Moines*, 103 Iowa, 347, 72 N. W. 550; *Polk v. McCartney*, 104 Iowa, 567, 73 N. W. 1067; *Mason v. Sioux Falls*, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802.

²⁵ *State v. West Hoboken*, 53 N. J. Law, 64, 20 Atl. 737.

²⁶ *Wiggin v. Mayor*, 9 Paige (N. Y.) 16; *Alberger v. Mayor*, 64 Md. 1, 20 Atl. 988; *State v. District Ct.*, 33 Minn. 295, 22 N. W. 295; *CITY OF BLOOMINGTON v. RAILROAD CO.*, 134 Ill. 451, 26 N. E. 366.

²⁷ *People v. Board*, 62 Hun, 619, 16 N. Y. Supp. 705. The courts have no power to interfere to prevent the construction of a local improvement upon the ground that it is not necessary, and that its construction is an unreasonable burden upon the property sought to be assessed, unless the discretion vested in the city council has been abused to such an extent as to render the ordinance providing for the improvement so unreasonable that it may be declared void. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

²⁸ *Spaulding v. Association*, 87 Cal. 40, 25 Pac. 249.

²⁹ *Kahn v. Supervisors*, 79 Cal. 388, 21 Pac. 849; *Id.* (Cal.) 25 Pac. 408.

stantial rights of the property owner, or to the intelligent exercise of discretion committed to the common council, are material requirements; and unless they are complied with, the ordinance for the improvement is void.⁸⁰ But it has often been held that the validity of the ordinance is not effected by the absence of less important elements, such as particular specification of the work to be done, the materials to be used,⁸¹ the width of the street,⁸² or the proportion of the entire expense to be borne by the locality.⁸³

⁸⁰ *Hoyt v. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Hewes v. Reis*, 40 Cal. 255; *City of Terre Haute v. Lake*, 43 Ind. 480; *Gates v. Hancock*, 45 N. H. 528; *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736; *Hudson v. Marietta*, 64 Ga. 286.

⁸¹ *Becker v. Washington*, 94 Mo. 375, 7 S. W. 291; *City of Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Parish v. Golden*, 35 N. Y. 464; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788; *Wetmore v. Chicago*, 206 Ill. 367, 69 N. E. 234. As to what constitutes a defect for uncertainty, see *McDowell v. People*, 204 Ill. 499, 68 N. E. 379. Where there were mere inaccuracies in the description of the proposed improvement: *People v. Burke*, 206 Ill. 358, 69 N. E. 45; *McChesney v. Chicago*, 205 Ill. 611, 69 N. E. 82. But any substantial and material departure from the specification in a contract of a city which is required by law to be let to the lowest bidder will render the contract void, notwithstanding but one bid was presented for the work. *I.e. Tourneau v. Hugo* (Minn.) 97 N. W. 115. See *Williams v. Joyce* (Cal.) 74 Pac. 290; *City of Chicago v. Hulbert* (Ill.) 68 N. E. 786.

⁸² *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580; *Woods v. Chicago*, 135 Ill. 582, 26 N. E. 608; *Burghard v. Fitch*, 24 Ky. Law Rep. 1983, 72 S. W. 778; *Gage v. Chicago*, 196 Ill. 512, 63 N. E. 1031; *Smythe v. Chicago*, 197 Ill. 311, 64 N. E. 361. Nor is the ordinance void for failing to specify the time within which the work shall be completed. *Allen v. La Force*, 95 Mo. App. 324, 68 S. W. 1057; *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

⁸³ *Kimble v. Peoria*, 140 Ill. 157, 29 N. E. 723.

CONTRACTS.

111. A municipal contract for public improvements is subject to the following limitations and conditions:

- (1) The subject-matter of the contract must have been included within the ordinance or resolution ordering the improvement.**
- (2) The contract must not surrender or abdicate any public function or duty.**
- (3) It must be let and made in the prescribed method.**

Assuming that the statutory requirements and conditions precedent to the making of a public improvement have been complied with before the passage of the ordinance or resolution that the improvement shall be made by the city, it is important next to inquire whether the contract formulated in pursuance thereof is within the scope and purview of the ordinance. At every step in the transaction there is a challenge of authority which the contractor must heed at his peril:³⁴ (a) Has the legislature under the Constitution power to grant authority to the municipality? (b) Has the legislature duly conferred such power upon the municipality? (c) Has the governing board of the municipality, in pursuance of such authority, ordained that the improvement shall be made? (d) Is the proposed contract within the scope of the ordi-

³⁴ Ante, § 100, and note 62, c. 12; *Jones v. Lind*, 79 Wis. 64, 48 N. W. 247; *Fletcher v. Oshkosh*, 18 Wis. 229; *Drummond v. Eau Claire*, 79 Wis. 97, 48 N. W. 244; *Flewellin v. Proetzel*, 80 Tex. 191, 15 S. W. 1043; *Ziegler v. Chapin*, 59 Hun, 214, 13 N. Y. Supp. 783; *Id.*, 126 N. Y. 342, 27 N. E. 471; *DEY v. JERSEY CITY*, 19 N. J. Eq. 412; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480, 32 L. Ed. 899; *Mathewson v. Grand Rapids*, 88 Mich. 558, 50 N. W. 651, 26 Am. St. Rep. 299; *White v. Stevens*, 67 Mich. 33, 34 N. W. 255; *New Decatur v. Berry*, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827; *Green v. Ward*, 82 Va. 324; *People v. Weber*, 89 Ill. 347; *Churchman v. Indianapolis*, 110 Ind. 259, 11 N. E. 301; *City of St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; *Murphy v. Louisville*, 9 Bush (Ky.) 189; *Welker v. Potter*, 18 Ohio St. 85; *Spokane Falls v. Browne*, 3 Wash. St. 84, 27 Pac. 1077.

nance? (e) Is the person assuming to represent the city in making the contract an authorized agent thereof? If an affirmative answer can be given to all these questions, the contractor may feel secure in proceeding under his municipal contract.

Authority for Contract.

These subjects have been hereinbefore considered, and it only remains to call special attention to the fourth question: To determine whether the contract is within the scope of the ordinance, particular attention should be directed to ascertaining whether the contract is (1) within the topographical limits prescribed in the ordinance;³⁵ (2) within the monetary limits fixed therein;³⁶ (3) of the nature of the improvement ordained by the council.³⁷ It is obvious that a contract to grade, gutter, and pave a particular street will not support a contract upon another and different street;³⁸ nor will an ordinance to expend ten thousand dollars in a specified improvement warrant a contract for the expenditure of fifteen thousand dollars for that purpose;³⁹ nor can a contract to repair a street be safely based upon an ordinance to grade and pave it.⁴⁰ The last distinction may become important because of the fact that in most jurisdictions local assessments

³⁵ *PEOPLE v. BROOKLYN*, 4 N. Y. 419, 55 Am. Dec. 266; *Rogers v. St. Paul*, 22 Minn. 494; *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566; *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *Craig v. Philadelphia*, 89 Pa. 265.

³⁶ *Ante*, §§ 23, 24; *Dolese v. McDougall*, 182 Ill. 486, 55 N. E. 547; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Clarke v. Chicago*, 185 Ill. 354, 57 N. E. 15.

³⁷ *Church v. People*, 179 Ill. 205, 53 N. E. 554; *Harrison v. Chicago*, 163 Ill. 129, 44 N. E. 395; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112; *Board of Councilmen of City of Frankfort v. Murray*, 99 Ky. 422, 36 S. W. 180; *City of Alton v. Middleton*, 158 Ill. 442, 41 N. E. 926; *North Pacific L. & M. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4.

³⁸ *Willard v. Albertson*, 23 Ind. App. 166, 54 N. E. 446.

³⁹ *Clarke v. Chicago*, 185 Ill. 354, 57 N. E. 15.

⁴⁰ *O'Meara v. Green*, 16 Mo. App. 118.

for improvements are held not to warrant repair;⁴¹ and so the means promised and given to the contractor in consideration of his work might be void. But such result would not ordinarily prevent recourse upon the municipal treasury for his compensation.⁴² If the contract made should transgress the pecuniary limits or the section of the city prescribed in the ordinance, the contract would be void as to the excess of money promised, or the work outside the boundary limits of the ordinance.⁴³

Public Powers Inalienable.

As we have heretofore seen, no public corporation may in any way alienate or surrender the trust powers conferred upon it for the public welfare.⁴⁴ Of this nature are police powers, eminent domain, control of streets, and the like. A contract, therefore, with a gas or water company, though based upon a valid consideration, permitting it to use the streets of a city for the purpose of laying down its mains, cannot, as we have seen, obstruct a city in the exercise of any

⁴¹ *Bullitt v. Salvage*, 20 Ky. Law Rep. 599, 47 S. W. 255.

⁴² *City of Memphis v. Brown*, 20 Wall. (U. S.) 289, 22 L. Ed. 264; *Bill v. Denver* (C. C.) 29 Fed. 344; *Bucroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807; *Robertson v. Omaha*, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534; *Reilly v. Albany*, 112 N. Y. 30, 19 N. E. 508; *Michel v. Police Jury*, 9 La. Ann. 67; *City of Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625.

⁴³ *Ante*, § 97. But under a statute giving a corporation authority to construct sewers within the municipality and beyond it, the town may construct sewers within its territorial limits, and in that of adjoining municipalities to secure an outlet. *Butler v. Montclair*, 67 N. J. Law, 426, 51 Atl. 494. See *Langley v. Augusta* (Ga.) 45 S. E. 486; *Le Feber v. Northwestern Heat, Light & Power Co.* (Wis.) 97 N. W. 203; *City of Chicago v. Hulbert* (Ill.) 68 N. E. 786; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125, 18 Ky. Law Rep. 238.

⁴⁴ *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Bush v. Portland*, 19 Or. 45, 23 Pac. 667, 20 Am. St. Rep. 789; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

of these public powers; and the company cannot enjoin a contractor in the execution of a contract made by him with the city calling for grading below the level of the pipes, and thus requiring them to be relaid below the new level of the street.⁴⁵ Nor will a contract right of a street railway company to use the city streets prevent work under a contract to regrade the entire street, and thereby disturb the bed and track of the railway, even though the company had itself agreed to make the improvement.⁴⁶

Improvement Contracts.

As shown in the last chapter,⁴⁷ municipal contracts must be let and made in the manner prescribed by law, of which all persons are bound to take notice; and it need be here further noted only that with regard to contracts for improvements it has been held that the discretion exercised by a city council in regard to the expediency and method of making improvements is not the subject of judicial review;⁴⁸ that,

⁴⁵ *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665.

⁴⁶ *Chicago, B. & Q. R. Co. v. Quincy*, 139 Ill. 355, 28 N. E. 1089.

⁴⁷ *Ante*, § 102; *Young v. People*, 196 Ill. 603, 63 N. E. 1075.

⁴⁸ *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667; *City of Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532; *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962; *Alberger v. Mayor*, 64 Md. 1, 20 Atl. 988. But where the determination has been arrived at without the exercise of discretion, the action of the council may be the subject of judicial review. See *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448, where a city council, by ordering the construction of a new sidewalk at the expense of the abutting property owners, determined that such sidewalk was necessary, and that the abutting property was benefited thereby to the extent of a special tax. It was held that such determination, unless arbitrary and unreasonable, was conclusive of the question of the necessity of the improvement, and of the benefit to be derived therefrom. See, also, *Pierson v. People*, 204 Ill. 456, 68 N. E. 383; *Beck v. Holland (Mont.)* 74 Pac. 410; *Burckhardt v. Atlanta*, 103 Ga. 302, 30 S. E. 32; *Holdom v. Chicago*, 169 Ill. 109, 48 N. E. 164; *McChesney v. Chicago*, 171 Ill. 253, 49 N. E. 548; *Allen v. Woods (Ky.)* 45 S. W. 106.

without readvertising, a board, after rejecting the bids, may reconsider its action and award a contract upon the original biddings;⁴⁹ that a contract for a public improvement is one for personal services and skill, and not assignable without the consent of the municipality, and therefore that the assignee can maintain no action against the municipality for services rendered by him;⁵⁰ that a contract let under bidding is made and executed only when a bid has been accepted by the proper agency of the municipality in the manner required by statute.⁵¹ But the better rule seems to be that the acceptance and use of the thing contracted for is a completion of the contract, and estops the corporation from objecting to merely formal matters;⁵² also that, where the contract provides that matters of uncertainty or dispute arising under a contract in making the improvement shall be submitted for arbitration, no action can be maintained by either party without first offering to make such submission.⁵³

DAMAGES.

112. No action lies at common law against a municipal corporation for damages resulting to the property of an individual from the prosecution, with reasonable care and skill, of duly authorized works of municipal improvement.

This rigorous doctrine of the common law, though often contested in our American courts because of its rank injustice in individual cases, has nevertheless been fully maintained by them,⁵⁴ and the modifications or alterations found in the de-

⁴⁹ *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501.

⁵⁰ *Delaware County v. Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674.

⁵¹ *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736.

⁵² *Ante*, § 96; *Abbott v. Hermon*, 7 Me. 118; *People v. Swift*, 31 Cal. 26; *Fisher v. School Dist.*, 4 Cush. (Mass.) 494.

⁵³ *Phelan v. Mayor*, 119 N. Y. 86, 23 N. E. 175.

⁵⁴ *Smith v. Washington*, 20 How. (U. S.) 135, 15 L. Ed. 858; *Wat-*

cisions of several of the states are due to constitutional or statutory changes in the common law. In the leading case of *O'Connor v. City of Pittsburgh*,⁵⁵ in which, by a reduction of seventeen feet in the street grade, a church which had been erected according to directions of the city regulator was rendered worthless and required to be torn down, the court said: "We had this case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled not only in Pennsylvania, but by every decision in the sister states, except one. * * * The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamed that it was laying the foundation of such injustice, but as the charter stands it is unavoidable." The authority given the city by its charter was "to improve, repair, and keep in order the streets." The concurrence of decision in similar cases by the Supreme Courts of the United States,⁵⁶ of Massachusetts,⁵⁷ and of New York⁵⁸ in this view, and its adoption by all the other states but one,⁵⁹ leaves no doubt as to this doctrine of the common law as above stated. Chief Justice Gibson, in the case above cited, expressed the popular opinion in stating that "to obtain complete justice every damage to private property ought to be

son v. Kingston, 114 N. Y. 88, 21 N. E. 102; *Callender v. Marsh*, 1 Plck. (Mass.) 418; *O'CONNOR v. PITTSBURGH*, 18 Pa. 187; *Humes v. Knoxville*, 1 Humph. (Tenn.) 403, 34 Am. Dec. 657; *City of Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Goodall v. Milwaukee*, 5 Wis. 32; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89.

⁵⁵ 18 Pa. 187.

⁵⁶ *Pumpelly v. Canal Co.*, 13 Wall. (U. S.) 166, 20 L. Ed. 557.

⁵⁷ *Brown v. Lowell*, 8 Metc. (Mass.) 172.

⁵⁸ *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357.

⁵⁹ For a full half century, beginning with the cases of *Goodlor & Smith v. Cincinnati*, in 4 Ohio, 514, the Supreme Court of Ohio has maintained this exceptional position on the law of consequential damages for grading by a municipal corporation.

compensated by the state or corporation that occasions it, and a general statutory remedy ought to be provided to assess the value." It was ruled in that case⁶⁰ that, since the work of improvement did not trespass upon the land of the plaintiff, no property of the plaintiff was taken within the meaning of the constitutional provision requiring just compensation in case of exercise of the power of eminent domain, and therefore plaintiff could not evoke the protection of the Constitution. Since the decision in that case many states have incorporated into their Constitutions a provision that private property shall not be taken or damaged for public use without just compensation therefor;⁶¹ and most of the other states have obtained the same result by legislative enactment.⁶²

Statutory Changes.

The details of these statutes are so various in the several states as to forbid our consideration. Only the general features can be here considered. In their purpose and effect they protect the property owner in his constitutional right to due process of law by providing for him a hearing before some competent tribunal, both as to the expediency of the improvement and the amount of the damages, and secure to him payment of the same out of the public treasury. But it is generally provided that the special damages suffered by each property holder may be set off by the special benefit to the property from the improvement.⁶³ This results practically in a compari-

⁶⁰ O'CONNOR v. PITTSBURGH, 18 Pa. 187.

⁶¹ See Constitutions of California, Georgia, Illinois, Missouri, Nebraska, and West Virginia.

⁶² The undoubted power of the legislature to thus change the common-law rule was recognized and its use recommended by Chief Justice Gibson in O'CONNOR v. PITTSBURGH, *supra*, in 1851, and most of the states have made the change during the last half century.

⁶³ Clark v. Elizabeth, 61 N. J. Law, 565, 40 Atl. 616; Pickles v. Ansonia (Conn.) 56 Atl. 552; Barr v. Omaha, 42 Neb. 341, 60 N. W. 591; Chase v. Portland, 86 Me. 367, 29 Atl. 1104; Commissioners of Town of Asheville v. Johnson, 71 N. C. 398; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871.

son of the value of each particular piece of property at the beginning of the improvement with its value immediately after its completion. The award of damages is thus confined to those few instances in which the property is not enhanced in value by the improvement. The decisions upon this question, however, are not uniform, except in holding that allowance may be made for such benefits only as are not common to the general public.⁶⁴ Some cases hold that the set-off can be allowed only against incidental injury sustained,⁶⁵ while others allow it against the value of the land as well.⁶⁶ A few cases deny all right of set-off.⁶⁷

Remedies Provided.

The remedy also for obtaining compensation is various in the several states. In some of them the property holder must appear before the city council and there present his claim for damages, which damages are thereupon estimated by some tribunal provided by statute. In other cases a proceeding must

⁶⁴ *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. 752. The special benefits which may be applied in reduction of damages sustained by a property owner from a change in the street grade are not private improvements subsequently made by his neighbors, but only those local and peculiar benefits received by him from the change. *Pickles v. Ansonia*, supra. See *City of Joliet v. Adler*, 71 Ill. App. 456; *Grier v. Homestead Borough*, 6 Pa. Super. Ct. 542, 42 Wkly. Notes Cas. 18; *Chicago Union Traction Co. v. Chicago*, 204 Ill. 363, 68 N. E. 519; *Stowell v. Ashley* (Mass.) 68 N. E. 675; *Walsh v. City of Scranton*, 23 Pa. Super. Ct. 276; *Whitehead v. Manor Borough*, 23 Pa. Super. Ct. 314.

⁶⁵ *City of Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321. In *Lux & Talbott Stone Co. v. Donaldson* (Ind. Sup.) 68 N. E. 1014, the court held that in an action to recover assessments for a street improvement an abutting property owner cannot set up a counterclaim for damages arising out of the failure of the contractor to perform the work according to the contract, the work having been duly accepted by the city council.

⁶⁶ *Putnam v. Douglas Co.*, 6 Or. 328, 25 Am. Rep. 627; In re *Root's Case*, 77 Pa. 276.

⁶⁷ *Israel v. Jewett*, 29 Iowa, 475.

be brought in court by the corporation against the property holder, wherein the property is condemned for the public use, and the damages therefor are duly ascertained; or, if the municipality shall omit to take this proceeding before entering upon its work of improvement, the property holder may bring it for the purpose of obtaining compensation, with practically the same result as if brought by the municipality. In some states a right of action at common law as for other damages is expressly given; and in some choice is allowed the property holder between two or more of these remedies, in which case the election of any one remedy excludes the others, and the decision thereunder is conclusive of his right.⁶⁸ This is based upon the doctrine, well established by many judicial decisions, that due process of law guarantied by the Constitution may be had as well by special proceedings before a special tribunal as by an action in court.⁶⁹ It has often been held that payment of damages must precede the taking of private property for public use;⁷⁰ but unless this is provided by statute it has generally been held sufficient that adequate provision is made for ascertaining and securing the compensation.⁷¹ The property holder is entitled to demand compensation as soon as the appropriation has been definitely decided upon, without waiting for the actual taking.⁷²

⁶⁸ *Righter v. Newark*, 45 N. J. Law, 104; *Brown v. Grand Rapids*, 83 Mich. 101, 47 N. W. 117; *Arends v. Kansas City*, 57 Kan. 350, 46 Pac. 702; *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351.

⁶⁹ *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Reclamation Dist. v. Goldman*, 65 Cal. 638, 4 Pac. 678; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

⁷⁰ *Hirth v. Indianapolis*, 18 Ind. App. 673, 48 N. E. 876; *Martin v. Tyler*, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

⁷¹ *Sage v. Brooklyn*, 89 N. Y. 189.

⁷² *Cooley*, Const. Lim. (6th Ed.) 696. But in *Devlin v. Philadelphia*, 206 Pa. 518, 56 Atl. 21, the court said that no damages could be recovered for the establishment of a grade in a city until the actual work of grading has begun.

SPECIAL ASSESSMENTS.

- 113. Special assessments for municipal improvements are authorized and made upon the idea that property enhanced in value by such improvements should bear the expense thereof, not as a burden, but as compensation for benefits specially conferred thereby.**

It is a fundamental doctrine of American jurisprudence that those receiving special benefits from the public should make compensation for them.⁷³ It finds its expression in the state by its division into counties, and assessments of county property for county improvements and advantages, as well as by the taxation of municipalities for municipal benefits and privileges. The application of this doctrine within municipal limits results in local assessments for special benefits conferred. The authority of the legislature to provide for these local assessments has been established by repeated judicial decision declaring not only their constitutionality, but also their reasonableness.⁷⁴ For example, the Supreme Court of Missouri has happily said: "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. * * * General taxation for a purely local

⁷³ 1 Hare, Const. Law, 301; Burrough, Tax'n, 460, 461.

⁷⁴ Cooley, Const. Lim. (6th Ed.) 614, citing *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *City of Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *City of Chicago v. Larned*, 34 Ill. 203; *Hines v. Leavenworth*, 3 Kan. 186; *Farrar v. St. Louis*, 80 Mo. 380; *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Richardson v. Morgan*, 16 La. Ann. 429; *Baker v. Cincinnati*, 11 Ohio St. 534; *State v. Dean*, 23 N. J. Law, 335; *City of Fairfield v. Ratcliff*, 20 Iowa, 396; *McGehee v. Mathis*, 21 Ark. 40; *Palmer v. Stumph*, 29 Ind. 329; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Cain v. Commissioners*, 86 N. C. 8; *Norfolk City v. Ellis*, 26 Grat. (Va.) 224; *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701; *Roundtree v. Galveston*, 42 Tex. 612. See, also, *City of Chicago v. Brown*, 205 Ill. 568, 69 N. E. 63.

purpose is unjust. It burdens those who are not benefited, and benefits those who are exempt from the burden."⁷⁵ So, likewise, the Supreme Court of Louisiana has declared that the system of paying for such improvements wholly out of the general treasury is inequitable; that often it results in great extravagance, abuse, and injustice; and that it is safer and juster to compel the particular locality specially benefited to bear specially the burden in whole or in part.⁷⁶ The idea underlying these special levies is that no injustice can result from requiring property enhanced in value by local improvements to pay the cost thereof, especially when this is less than the enhancement; and the possibility of injustice is removed, as we have seen, when compensation is provided for damages sustained from these improvements.

Municipal Discretion—Due Process of Law.

Whether a given improvement is expedient and necessary, and whether it is general or local, are legislative questions; and when the municipality is vested with power to determine them the municipal decision is conclusive, and not subject to review by the courts.⁷⁷ This general doctrine is modified by

⁷⁵ *Lockwood v. St. Louis*, 24 Mo. 20.

⁷⁶ *Municipality No. 2 v. Dunn*, 10 La. Ann. 57.

⁷⁷ *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601; *Hutcheson v. Storrie* (Tex. Civ. App.) 48 S. W. 785; *Kansas City v. Trotter*, 9 Kan. App. 222, 59 Pac. 679.

Where a city charter provides that paving of its streets may be initiated upon the petition of a majority of the lot owners, but that the city council may make the improvement without any petition when public necessity requires it, the power to determine whether public necessity requires the making of such improvement without a petition is in the discretion of the council, whose decision is final, unless arbitrary or fraudulent. *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448; *Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536. Whether the motives of a town council in vacating a street are proper cannot be judicially inquired into, but the end accomplished might be considered in passing on its validity. *Pence v. Bryant* (W. Va.) 46 S. E. 275.

decisions in some states that there may be judicial inquiry on charge of fraud, mistake, oppression, or corruption,⁷⁸ and, if sustained, the court may vacate the municipal ordinance or enjoin the work of improvement.⁷⁹ It has also been held that similar remedy may be employed in case where local assessment has been made for what is obviously a work of general municipal improvement;⁸⁰ and it is established law, as we have heretofore seen, that such remedies may be resorted to when the special assessment is not authorized by statute,⁸¹ or is made without compliance with the statutory conditions precedent.⁸² And accordingly it has been held that in cases where discretion is to be exercised by any tribunal in determining whether a special assessment shall be levied, or what portion shall be imposed upon particular property, each owner is entitled, under constitutional guaranty of due process of law, to such notice as will enable him to challenge the expediency of the improvement or the justice of the levy.⁸³ It has also been held that this notice need not necessarily be in limine, but is sufficient if given in due time to permit an appearance and contest upon all matters affecting his rights and interests under the improvement.⁸⁴ But it seems no notice is necessary where the improvement is ordained by legislative enactment, allowing no discretion to the common council,

⁷⁸ *CITY OF BLOOMINGTON v. RAILROAD CO.*, 134 Ill. 451, 26 N. E. 366; *Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710; *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682.

⁷⁹ *Niver v. Bath*, 27 Misc. Rep. 605, 58 N. Y. Supp. 270; *Richter v. New York*, 24 Misc. Rep. 613, 54 N. Y. Supp. 150; *Holmes v. Hyde Park*, 121 Ill. 128, 13 N. E. 540.

⁸⁰ *CITY OF BLOOMINGTON v. RAILROAD CO.*, 134 Ill. 451, 26 N. E. 366.

⁸¹ Ante, §§ 21, 24.

⁸² Ante, §§ 74, 95.

⁸³ *STUART v. PALMER*, 74 N. Y. 183, 30 Am. Rep. 289; *ULMAN v. MAYOR*, 72 Md. 587, 20 Atl. 141, 11 L. R. A. 224; *DAVIDSON v. NEW ORLEANS*, 96 U. S. 97, 24 L. Ed. 616.

⁸⁴ *Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117.

and making the levy a mere matter of mathematical calculation, as upon the basis of frontage.⁸⁵

Apportioning Assessments.

Two methods are in common use for fixing the basis for apportioning the assessment upon the separate lots in a locality: (1) An assessment according to a standard fixed in the enabling act, and applicable to lots by measurements of frontage, surface, or value; (2) an assessment made by commissioners or a jury of view upon the basis of the benefit estimated by them to be conferred upon each lot by the proposed improvement. The frontage rule is the one in common use, and has been sustained by repeated adjudication,⁸⁶ though there are some cases holding to the contrary.⁸⁷ By this method the entire cost of a given street improvement is apportioned among the lots fronting thereon according to the respective frontage of each lot on the street. Special benefits are the basis of special assessments; and assessment without

⁸⁵ *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780.

⁸⁶ *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *Parker v. Ohallie*, 9 Kan. 155; *Magee v. Commonwealth*, 46 Pa. 358; *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580; *Whiting v. Quackenbush*, 54 Cal. 306; *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Beaumont v. Wilkesbarre*, 142 Pa. 198, 21 Atl. 888; *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871; *Allen v. Drew*, 44 Vt. 174; *King v. Portland*, 2 Or. 146; *ULMAN v. MAYOR*, 72 Md. 587, 20 Atl. 141, 11 L. R. A. 224; *WHITE v. PEOPLE*, 94 Ill. 604; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *State v. Reiss*, 38 Minn. 371, 38 N. W. 97; *Hand v. Elizabeth*, 30 N. J. Law, 365; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127; *Cleveland v. Tripp*, 13 R. I. 50; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004; *Heman Const. Co. v. McManus* (Mo. App.) 77 S. W. 310.

⁸⁷ *Clapp v. Hartford*, 35 Conn. 66; *Brown v. Central Bermudez Co.* (Ind. Sup.) 69 N. E. 150; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Agens v. Newark*, 37 N. J. Law, 415, 18 Am. Rep. 729; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Warren v. Grand Haven*, 30 Mich. 24; *Peay v. Little Rock*, 32 Ark. 31.

benefit, and obvious excess of levy over betterment, have been declared to be confiscation, and properly enjoined.⁸⁸

Exemptions.

Local assessment is obviously an exercise of the taxing power; and yet such assessments have generally been held not to come within the meaning of the word "taxation" as used in clauses of revenue statutes exempting certain property from taxation.⁸⁹ For example, "all public taxes"⁹⁰ has been held not to embrace local assessments. So also of the phrases "rates and assessments";⁹¹ "taxation of every kind";⁹² "taxation of every description";⁹³ "all taxes, either state, parish, or city";⁹⁴ "all and every county, road, city, and school tax";⁹⁵ "taxes of every kind";⁹⁶ "charges and impositions";⁹⁷ "any tax or public imposition whatever";⁹⁸ "taxes, charges, and impositions."⁹⁹ In short, exemption from general taxation does not exempt from local assessment. But it

⁸⁸ *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.

⁸⁹ *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *Ford v. Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590; *Lima v. Cemetery Ass'n*, 42 Ohio St. 128, 51 Am. Rep. 809; *City of Atlanta v. First Presb. Church*, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852; *Oliver Cemetery Co. v. Philadelphia*, 93 Pa. 129, 39 Am. Rep. 132; *In re City of New York*, 11 Johns. (N. Y.) 77; *City of Baltimore v. Cemetery Co.*, 7 Md. 517.

⁹⁰ *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506.

⁹¹ *Northern Liberties v. St. John's Church*, 13 Pa. 104.

⁹² *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412.

⁹³ *City of Paterson v. Society*, 24 N. J. Law. 385.

⁹⁴ *City of La Fayette v. Asylum*, 4 La. Ann. 1.

⁹⁵ *Trustees of Illinois & M. Canal v. Chicago*, 12 Ill. 403.

⁹⁶ *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613.

⁹⁷ *City of Baltimore v. Proprietors*, 7 Md. 517.

⁹⁸ *City of Bridgeport v. Railroad Co.*, 36 Conn. 255, 4 Am. Rep. 63.

⁹⁹ *New Jersey R. & Transp. Co. v. Newark*, 27 N. J. Law, 185.

has been held that "exemption from all assessments and taxes whatever by the city" exempts from local assessment;¹⁰⁰ and so also of exemptions from "all civil impositions, taxes, and rates."¹⁰¹ It is a question of legislative intention, to be ascertained by statutory interpretation, and it has been held to be constitutional for the legislature to exempt from special assessment as well as from general taxation.¹⁰²

ENFORCING COLLECTION.

114. Special assessments, being charges upon particular property, may be collected by enforcing the lien on the property in the method prescribed by the statute. In some states they have been held to afford ground for personal judgment against the property owner; but the weight of authority, as well as the reason of the matter, opposes such remedy for the enforcement of a special assessment.

No valid lien exists unless the assessment has been made in substantial compliance with the provisions of the enabling act.¹⁰³ When these have been complied with, the lien becomes

¹⁰⁰ First Division of St. Paul & P. R. Co. v. St. Paul, 21 Minn. 526.

¹⁰¹ Harvard College v. Boston, 104 Mass. 470.

¹⁰² Dyker Meadow Land & Improvement Co. v. Cook, 3 App. Div. 164, 38 N. Y. Supp. 222; Yates v. Milwaukee, 92 Wis. 352, 66 N. W. 248; City of Richmond v. Railroad Co., 21 Grat. (Va.) 604.

¹⁰³ Inhabitants of Village of Houstonia v. Grubbs, 80 Mo. App. 433; Huff v. Jacksonville, 39 Fla. 1, 21 South. 776; Rosetta Gravel-Paving & Improvement Co. v. Jollisaint, 51 La. Ann. 804, 25 South. 477; Ardrey v. Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726.

A levy of a special assessment for the construction of an improvement is necessary to the creation of a lien, so that, where no levy has been made by the city council, no lien will be created by certifying the expense of the improvement to the council. Hall v. Moore (Neb.) 92 N. W. 294. See Cemansky v. Fitch (Iowa) 96 N. W. 754, where it was held that the lien attached at the time that the certificate of the resolution for the improvement was filed by the city clerk with the county auditor as required by statute, though the

fixed in favor of the city, and is not impaired by official misconduct or defective performance in the work of improvement.¹⁰⁴ The city usually provides in its contract for improvement that the contractor shall receive these liens in compensation for performance of his contract, and they are then subject to enforcement according as the local law may provide—by the contractor as assignee, or by the city for his use and benefit. In either case the assessment levy must be satisfied, and the owner cannot enjoin the same or recoup for damages resulting from failure of or defect in the work of improvement after it has been accepted by the duly constituted authorities.¹⁰⁵

Personal Liability.

The power of the legislature to declare a local assessment to be a personal charge against the owner as well as a lien upon his property has been strenuously contested in many

work had been previously completed. Special assessments do not become liens save as made so by statutory authority. *Id.*

¹⁰⁴ *Dressman v. Bank*, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; *Makley v. Whitmore*, 61 Ohio St. 587, 56 N. E. 461; *Adams v. Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; *Conlin v. Seaman*, 22 Cal. 549; *City of Lowell v. Hadley*, 8 Metc. (Mass.) 194; *Williams v. Holden*, 4 Wend. (N. Y.) 227.

¹⁰⁵ *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689; *City of Henderson v. Lambert*, 14 Bush (Ky.) 24; *McDonald v. Murphree*, 45 Miss. 705; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548; *Inhabitants of Towns of Windsor & Suffield v. Field*, 1 Conn. 284; *Hovey v. Mayo*, 43 Me. 322; *Chinn v. Trustees*, 32 Ohio St. 238; *Vanderbeck v. Jersey City*, 29 N. J. Law, 441; *City of Peoria v. Kidder*, 26 Ill. 358; *Old Colony R. Co. v. Fall River*, 147 Mass. 455, 18 N. E. 425; *Taylor v. Palmer*, 31 Cal. 240; *Gage v. Evans*, 90 Ill. 569; *Cochran v. Collins*, 29 Cal. 129; *Heywood v. Buffalo*, 14 N. Y. 534; *Hughes v. Kline*, 30 Pa. 230; *Strenna v. City Council*, 86 Ala. 340, 5 South. 115. Where during the time improvements were being made opposite the owner's property he knew the work was being done and took no steps to prevent the same and did not object thereto, he was estopped from questioning his liability for a portion of the expense assessed against the property. *Nowlen v. Benton Harbor* (Mich.) 96 N. W. 450.

states, while in others it has been allowed to pass unchallenged. The cases supporting and denying this power are perhaps nearly equal in number; but recent judicial tendency, and probably the majority of seriously contested cases, concur with text-writers in denying the power of the legislature to make a personal charge out of this character of assessments.¹⁰⁶ On the one hand, it is contended that such personal charge is opposed to the definition of a "local assessment," and that the municipality may always protect itself in any proper improvement by purchasing the property for its assessment;¹⁰⁷ to which it has been replied that "it is not land the government needs; it is money. The tax is assessed in money, to be paid by the owner of the money."¹⁰⁸ In a recent Alaska case it was held that abutting property owners who had petitioned the city for a specific street improvement, and had seen the improvement made in accordance with their petition in front of their property, were liable to the municipality for the cost of the same in an action of assumpsit upon an implied contract for materials furnished and work and labor done.¹⁰⁹

¹⁰⁶ *City of Seattle v. Yesler*, 1 Wash. T. 571; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435; *Green v. Ward*, 82 Va. 324; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508, 8 Am. Rep. 480; *Craw v. Tolone*, 96 Ill. 255, 36 Am. Rep. 143; *City of Burlington v. Quick*, 47 Iowa, 222; *Higgins v. Ausmuss*, 77 Mo. 351. Contra: *Clemens v. Baltimore*, 16 Md. 208; *Bennett v. Buffalo*, 17 N. Y. 383; *Hazzard v. Heacock*, 39 Ind. 172; *City of Lowell v. French*, 6 Cush. (Mass.) 223; *City of New Orleans v. Wire*, 20 La. Ann. 500; *Bonsall v. Lebanon*, 19 Ohio, 419; *Lovell v. St. Paul*, 10 Minn. 290 (Gil. 229).

¹⁰⁷ *Elliott, Roads & S.* § 400.

¹⁰⁸ *Brown, J.*, in *Litchfield v. McComber*, 42 Barb. (N. Y.) 288.

¹⁰⁹ *Town of Nome v. Lang*, 1 Alaska, 593.

CHAPTER XIV.

POLICE POWERS AND REGULATIONS.

- 115. Essential to a Municipality.
- 116. Delegation.
- 117. Limitation of Power.
- 118. Exercise of Power.
- 119. Double Police Power.
- 120. Peace and Order.
- 121. Sanitation.
- 122. Safety.
- 123. Comfort.
- 124. Occupations and Amusements.
- 125. Markets.
- 126. Violation and Enforcement.

ESSENTIAL TO A MUNICIPALITY.

- 115. The police power, inherent in the state as a paramount and inalienable attribute of sovereignty, is essential to a municipality as a public corporation.**

The English conception of the police power is thus given by Blackstone: "The due regulation and domestic rule of the kingdom whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."¹ As a paramount sovereign power, its lineage may be traced to the ancient maxim, "*salus populi est suprema lex.*" It is the expression of that instinct of self-preservation inherent in every animate creature, and attributed as essential to all nations, states, and corporations, whether public or private. It is the inherent faculty and function of life itself; and no person, natural or artificial, no

¹ 4 Bl. Comm. 162.

state or corporation, to which this right and power is denied, has any real life, and its bare existence will be ephemeral, barren, and useless. It is an adaptation to public use of that ancient Latin maxim, "Sic utere tuo ut alienum non lædas," and not only requires from the owner of property due respect and consideration for his neighbor's rights, but in case of emergency warrants the destruction of property without compensation to an owner, who is wholly without fault. This extraordinary and dangerous power is not of constitutional origin or grant.² It is institutional and inherent in government; and, as wisely remarked by Chief Justice Shaw, "it is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise."³ There are constitutional limitations upon it,⁴ but they are not always of easy application; and, since it is essentially a discretionary power, its chief limitation has been found in that common reason of enlightened judicial tribunals which was declared by Lord Coke to be the "very life of the common law."⁵ When exercised by due process of law, as in the abatement of nuisances through civil or criminal proceeding, this power is usually found to be wholesome and beneficial. Its summary exercise is always perilous to private right, and often cruelly unjust; as when in emergency, apparent or real, the property of one is sacrificed for the protection of others, or one is deprived of his personal liberty for the supposed safety of the many.

² *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Taylor v. Railroad Co.*, 6 Cold. (Tenn.) 646, 98 Am. Dec. 474; *Village of Carthage v. Frederick*, 122 N. Y. 273, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490.

³ *Slaughterhouse Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625. Cf. *Cooley*, Const. Lim. (6th Ed.) 704.

⁴ A police regulation operating unreasonably beyond the occasions of the enactment is not invalid because it may affect incidentally the exercise of some right guaranteed by the Constitution. *Anderson v. State* (Neb.) 96 N. W. 149.

⁵ *Co. Litt.* 97, 183.

DELEGATION.

- 116. The police power may be delegated by the state to a municipal corporation as a public function to be exercised within proper limits for all appropriate municipal purposes.**

As we have heretofore seen,⁶ the delegation of legislative power to a municipality, after much contention, has been established as constitutional by repeated adjudication. No stronger case can be made against this than in the matter of the police power. This is the paramount power in the state. It is supremely sovereign in its nature, involving discretion in its exercise, and often consequent deprivation and destruction. But even this great power has been so long exercised by municipal corporations, has been found so essential to the public welfare, and its delegation has been so often sustained by judicial decision, as to be established beyond question.⁷ The extent of its exercise is always within the legislative control. The police power delegated may be total or partial, or it may be entirely withheld by the legislature from the municipality. It has been decided, however, in some cases that a certain measure of police power is one of the inherent or essential powers of a municipality, for which no legislative grant is necessary,⁸ being, as we have seen in the last sec-

⁶ Ante, § 73.

⁷ *People v. Pierce*, 83 N. Y. Supp. 79, 85 App. Div. 125; 1 Dill. Mun. Corp. §§ 141, 308; *Elliott, Mun. Corp.* § 89; *Tied. Mun. Corp.* §§ 116, 147; 2 *Beach, Pub. Corp.* §§ 249, 582.

While the legislature usually delegates to local authorities the regulation and control of the public rights in the streets, it may at any time resume such authority and exercise as it deems best. *New England Telephone & Telegraph Co. v. Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *Boston Electric Light Co. v. Same, Id.*

⁸ *Vionet v. Municipality*, 4 La. Ann. 42; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

The legislature may invest municipal corporations with the police power of the state, in whole or in part, in the absence of consti-

tion, an essential attribute of all life, corporate and individual. It is usual for the charter to contain an express grant of police powers, or the same may be easily implied from the power granted to pass ordinances regulating the conduct, commerce and business in the municipality. The power thus granted, being peculiarly governmental, is one which the municipality must exercise for the public welfare, and may not either directly or indirectly abridge or alienate it.⁹ It has accordingly been held that a city council cannot bind itself nor its successors by contract to a course of conduct or of municipal inaction derogatory to the police power delegated by the state to the municipality.¹⁰

LIMITATION OF POWER.

117. Those powers conferred upon a municipal corporation which in their exercise conduce to protect the public safety and health and promote the comfort and convenience of the citizens and the general welfare of the municipality manifest the legislative intention in regard to the delegation of the police power to the municipality.

The corporation boundaries usually mark the limit for the exercise of the police power by the municipality; but in many

tutional prohibition. *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

⁹ *State v. Graves*, 19 Md. 351, 81 Am. Dec. 639; *Kittanning Electric Light, Heat & Power Co. v. Kittanning Borough*, 11 Pa. Super. Ct. 31; *City of McKeesport v. Railway Co.*, 2 Pa. Super. Ct. 242; *Capdevielle v. Railroad Co.*, 110 La. 904, 34 South. 868.

A city cannot by contract divest itself of the power to enforce proper police regulations. *City of Carbondale v. Wade*, 106 Ill. App. 654.

¹⁰ *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 694; *Davis v. Mayor*, 14 N. Y. 506, 67 Am. Dec. 186; *Britton v. New York*, 21 How. Prac. (N. Y.) 251; *Mayor, etc., of City of New York v. Britton*, 12 Abb. Prac. (N. Y.) 367; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593, 5 L. Ed. 339.

instances, for the preservation of the public health especially, the municipality is granted police power beyond its boundaries.¹¹ Thus, it has been held that the grant of power to acquire territory for a water supply beyond the limits of ~~the municipality~~ is within the competency of the legislature,¹² and that the municipality may exercise police power in the protection of the territory thus acquired to insure cleanliness, and prevent any business and conduct likely to corrupt the fountain of water supply for the city.¹³ So, likewise, to acquire outside territory for sewerage purposes, and to exercise police power over the same;¹⁴ also to establish quarantine beyond the municipal boundaries and thus protect the citizens from epidemic of any contagious or infectious disease;¹⁵ also to locate and regulate houses of detention and hospitals for infectious and contagious diseases beyond the city limits.¹⁶

¹¹ *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545.

¹² *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Mayor, etc., of City of New York v. Balley*, 2 Denio (N. Y.) 433; *Mayor, etc., of City of Rome v. Cabot*, 28 Ga. 50; *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664; *People v. McClintock*, 45 Cal. 11.

But a municipality which buys a piece of land on a private stream, outside the corporate limits, does not thereby acquire the right to appropriate the water of the stream. *Sparks Mfg. Co. v. Newton*, 60 N. J. Eq. 399, 45 Atl. 596; *Ingersoll v. Same*, Id.

¹³ *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354; *People v. Borda*, 105 Cal. 636, 38 Pac. 1110; *City of Coldwater v. Tucker*, *supra*.

¹⁴ *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

¹⁵ *Harrison v. Baltimore*, 1 Gill (Md.) 264; *City of Anderson v. O'Conner*, 98 Ind. 168; *Thomas v. Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525.

¹⁶ *Aull v. Lexington*, 18 Mo. 401; *Hutton v. Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203; *City of Anderson v. O'Conner*, 98 Ind. 168; *Hazen v. Strong*, 2 Vt. 427.

Extent of Power.

The extent to which municipalities may exercise the police power is not dependent upon the size of the city or village, but upon the charter grant of powers. A small village may thus have as much police power as a large city.¹⁷ The phrase "police powers" has often been used in the charter as expressing the legislative grant to the municipality. In such case the city may pass reasonable ordinances for the protection of the lives, limbs, health, comfort, and quiet of its citizens;¹⁸ and it has been held that such measure of police power as this is inherent in a municipal corporation, as being essential to the performance of its municipal functions as a public agency of the commonwealth.¹⁹ Usually there is found in the charter separate mention of the various subjects over which police power may be exercised, and over some of them the municipal control given may be only partial or imperfect. In such case the maxim, "*Expressio unius est exclusio alterius*," is often applied, and under a general grant of police power the municipality has been limited to the subjects specially mentioned, or at most to those and such others as absolutely require the exercise of this power for the welfare of the community.²⁰

¹⁷ *City of Owensboro v. Sparks*, 99 Ky. 351, 36 S. W. 4; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145.

¹⁸ The police power of a city extends to the regulation of water rates. *City of Knoxville v. Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

A city may have a building demolished as unsafe. *O'Rourke v. New Orleans*, 106 La. 313, 30 South. 837.

The charter of the city of Chicago gives the city power to limit the fare to be charged by street railways, and it was held in *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631, that, as a necessary incident to such power, it could enact ordinances requiring street railway companies to furnish transfer tickets entitling passengers to ride on a connecting line of the same company without the payment of an additional fare.

¹⁹ *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

²⁰ *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Carey v. Washington*, 5 Cranch C. C. (U. S.) 13, Fed. Cas. No. 2,404.

EXERCISE OF POWER.

118. The police power delegated to the municipality may be exercised either in the ordinary or in a summary manner.

The ordinary method is by the enactment of ordinances, and their enforcement by due process of law; as where one is prosecuted under a municipal warrant in a municipal court for breach of some police ordinance—such as one forbidding the keeping of a pig sty or a gambling house within the municipal limits. The summary method is that permitted to be used only in cases of emergency, when it becomes necessary to destroy individual property, or even take individual life, as the only apparent means of protecting the public and preventing still greater calamity. The municipality may lawfully employ through its police officers just so much force as is necessary to disperse a mob or quell a riot, even to the extent of maiming or killing persons engaged in the mob or riot,²¹ provided such an extreme measure is necessary for the protection of the public; and in case of great conflagration in a city, which cannot otherwise be stopped, the municipality, through its proper authorities, may lawfully, and with impunity, tear down or blow up buildings owned by private citizens, in order to arrest the progress of the flames.²²

License.

This power is also exercised by requiring municipal license for engaging in certain occupations, not as a means of revenue,

²¹ *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *DARGAN v. MOBILE*, 31 Ala. 469, 70 Am. Dec. 505.

²² *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Conwell v. Emrie*, 2 Ind. 35; *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109; *Correas v. San Francisco*, 1 Cal. 452; *Dunbar v. Alcalde Ayuntamiento*, 1 Cal. 355; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Field v. Des Moines*, 39 Iowa, 575, 28 Am. Rep. 46; *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; 2 Kent, Comm. 339.

but for the protection of the public.²³ Licenses are often granted by the municipality under state authority for the purpose of raising municipal revenue. When revenue is the purpose, then the municipality, within the limit allowed by law, exercises discretion as to the amount of tax to be paid by the licensee. When the license is required, however, in the exercise of a police power, then only such charge therefor may be made as fairly represents the expense incident to the exercise of the power.²⁴ Whether the license is for police or revenue, if not shown in the ordinance requiring it, will appear from the construction of the municipal charter.

DOUBLE POLICE POWER.

119. The legislature may confer police power upon a municipality over subjects within the provisions of existing state laws.

The general laws of the state apply as well to municipal corporations as to outside territory, and there is special necessity for the exercise of the police power in urban communities. Jurisdiction to enforce these state laws is often conferred upon the municipal courts; yet none of these things prevents the state from conferring police power upon municipalities over the same subject-matter.²⁵ But it has been

²³Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383; Ft. Smith v. Ayers, 43 Ark. 82; Ward v. Washington, 4 Cranch, C. C. (U. S.) 232, Fed. Cas. No. 17,163; Barthet v. New Orleans (C. C.) 24 Fed. 563; Carroll v. Tuscaloosa, 12 Ala. 173.

²⁴Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383; City of Boston v. Schaffer, 9 Pick. (Mass.) 415.

An ordinance imposing a license duty upon city cars for revenue purposes only is not an ordinance for police and internal government. Mayor, etc., of City of New York v. Railroad Co., 32 N. Y. 261. See, also, Johnson v. Philadelphia, 60 Pa. 445; Hodges v. Nashville, 2 Humph. (Tenn.) 61 (control of theaters).

²⁵State v. Ludwig, 21 Minn. 202; City of Brooklyn v. Toynbee.

held that police power in such cases is not inherent in a municipal corporation; nor can it be implied, but must be expressly conferred.²⁶ Other cases favor the implication of police power in the municipality where the offense does not vitally affect the public interests, but specially concerns the municipal welfare.²⁷ Moreover, as we have heretofore seen,²⁸ a majority of the states permit the enforcement of both state and municipal penalties for the same unlawful act, as being not only against the peace and dignity of the state, but also against the municipal welfare.²⁹

31 Barb. (N. Y.) 282; *State v. Quong* (Idaho) 67 Pac. 491; *Town of Rosedale v. Hanner*, 157 Ind. 390, 61 N. E. 792; *Cooley*, Const. Lim. (6th Ed.) 239.

²⁶ *City of Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802; *Id.*, 114 Ind. 600, 15 N. E. 804; *Ex parte Bourgeois*, 60 Miss. 663, 45 Am. Rep. 420; *Loeb v. Attica*, 82 Ind. 175, 42 Am. Rep. 494; *State v. Langston*, 88 N. C. 692; *Mayor, etc., of City of Mobile v. Allaire*, 14 Ala. 400.

²⁷ *Town of Bloomfield v. Trimble*, 54 Iowa, 399, 6 N. W. 586, 37 Am. Rep. 212; *Barter v. Commonwealth*, 3 Pen. & W. (Pa.) 253; *Davis v. Anita*, 73 Iowa, 325, 35 N. W. 244; *City of Amboy v. Sleeper*, 81 Ill. 499. See *Carey v. Washington*, 5 Cranch, C. C. (U. S.) 13, Fed. Cas. No. 2,404; *City of St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 89.

²⁸ Ante, § 77.

²⁹ *State v. Flint*, 63 Conn. 248, 28 Atl. 28; *Hankins v. People*, 106 Ill. 628; *Williams v. Warsaw*, 60 Ind. 457; *Rogers v. Jones*, 1 Wend. (N. Y.) 261, 19 Am. Dec. 493; *Greenwood v. State*, 6 Baxt. (Tenn.) 567, 32 Am. Rep. 539; *City of St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791; *People v. Bay City*, 36 Mich. 186; *City of Lebanon v. Gordon*, 99 Mo. App. 277, 73 S. W. 222; *State v. Muir*, 86 Mo. App. 642; *Id.*, 164 Mo. 610, 65 S. W. 285. See *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845.

PEACE AND ORDER.**120. The preservation of the public peace and order is the primary police function of a municipality.**

Whatever contention may have arisen over municipal police power, the authority to preserve the peace and order of the municipality, to prevent the exercise of unlawful violence, and to compel citizens and sojourners to abstain from riot, rout, and unlawful assembly has never been seriously questioned. It is regarded as an inherent municipal power essential to municipal life; and so, whenever the authority has been mooted, it has been uniformly sustained, in some cases even to the extent of the doubtful power of double punishment.³⁰ For even those decisions which hold such double punishment to be violative of constitutional provision are not based upon the want of municipal authority, but upon the positive prohibition against putting a person twice in jeopardy.³¹ Municipal regulations preservative of peace and order do not assume to punish crime against the state, but are confined to small offenses and lighter demonstrations of violence and disorder tending to crime. They are essentially means for the prevention of crime as well as the preservation of peace and order,³² and are therefore favored by the courts

³⁰ *City of Carlisle v. Heckinger*, 103 Ky. 381, 45 S. W. 358; *Kansas City v. Hallett*, 59 Mo. App. 160. Cases *supra*, note 29. But see *Ex parte Cross*, 44 Tex. Cr. R. 376, 71 S. W. 289.

³¹ *Ex parte Bourgeois*, 60 Miss. 663, 45 Am. Rep. 420; *State v. Keith*, 94 N. C. 933; *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

³² *Jefferson City v. Courtmire*, 9 Mo. 692; *Vason v. Augusta*, 38 Ga. 542; *Town of Washington v. Hammond*, 76 N. C. 33; *City of New Orleans v. Miller*, 7 La. Ann. 651.

A charter right of control over highways, streets, alleys, and public grounds authorizes an ordinance forbidding the making of any public address in a public place without first obtaining permission from the mayor. *Love v. Judge*, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618. See *Lincoln v. Boston*, 148 Mass. 578, 20 N. E. 329,

as wise provisions for increasing civilization. Such regulations are indispensable to municipalities in those states which, as a measure of public policy, declare public corporations responsible for the public peace and preservation of private property, and make them absolutely liable for damages done by a mob within the corporate boundaries.³³

SANITATION.

121. The preservation of the health of the population is uniformly recognized as a most important municipal function; and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality.

Congested populations tend to breed disease as well as disorder, and since health as well as order is an essential condition of good living, and one of the primary purposes of municipal incorporation, sanitary powers may not only be expressly conferred by the charter, or implied therefrom, but they have been judicially declared to be inherent in a municipality as a necessary attribute thereof,³⁴ and have been ex-

3 L. R. A. 257, 12 Am. St. Rep. 601; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *City of Wilkes-Barre v. Garebed*, 9 Kulp (Pa.) 273; *City of Grand Rapids v. Newton*, 111 Mich. 48, 69 N. W. 84, 35 L. R. A. 226, 66 Am. St. Rep. 387.

³³ *DARLINGTON v. NEW YORK*, 31 N. Y. 164, 88 Am. Dec. 248; *Campbell's Adm'x v. City Council*, 53 Ala. 527, 25 Am. Rep. 656. Municipalities are liable for whatever damages may be caused by mobs or riotous assemblages within their respective limits. *Street v. New Orleans*, 32 La. Ann. 577. But this is not so at common law. *MAYOR, ETC., OF BALTIMORE v. POULTNEY*, 25 Md. 107; *Praher v. Lexington*, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585.

³⁴ *Appeal of Borough of Butler (Pa.)* 1 Atl. 604; *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Monroe v. Lawrence*, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

exercised in ways innumerable. These powers are favored in American courts, and it has been accordingly held that, since a supply of wholesome water is necessary to the comfort and well-being of a city,³⁵ a municipal contract for the boring of an artesian well is an exercise of the police power. And so, likewise, the city may make such regulations as will insure pure milk,³⁶ or prevent the spread of a deadly disease in a fruit-producing tree.³⁷ So, also, it may regulate the cultivation of crops, such as rice, within the corporate limits,³⁸ the cleaning and care of sinks and cesspools,³⁹ burial of the dead,⁴⁰ and the location and operation of slaughter houses.⁴¹ It is competent also for a city to establish quarantine regulations,⁴² pesthouses, and places of detention,⁴³ and to exclude,

³⁵ *Kennedy v. Phelps*, 10 La. Ann. 227; *Town of Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483; *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

³⁶ *State v. Dupaquier*, 46 La. Ann. 577, 15 South. 502, 26 L. R. A. 162, 49 Am. St. Rep. 334; *People v. Vandecarr*, 81 App. Div. 128, 80 N. Y. Supp. 1108, Id., 175 N. Y. 440, 67 N. E. 913.

³⁷ *Bissell v. Davison*, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251. Cf. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

³⁸ *Town Council of Summerville v. Pressley*, 33 S. C. 56, 11 S. E. 545, 8 L. R. A. 854, 26 Am. St. Rep. 659; *Green v. Savannah*, 6 Ga. 1.

³⁹ *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. 1146; *Nicoulin v. Lowery*, 49 N. J. Law, 391, 8 Atl. 513.

⁴⁰ *Graves v. Bloomington*, 17 Ill. App. 476; *CITY OF AUSTIN v. ASSOCIATION*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; *COATES v. NEW YORK*, 7 Cow. (N. Y.) 586; *In re Bohon*, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618.

⁴¹ *Ex parte Heilbron*, 65 Cal. 609, 4 Pac. 648; *Belling v. Evansville*, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

⁴² *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

⁴³ *Elliott v. Supervisors*, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706; *City of Clinton v. Clinton Co.*, 61 Iowa, 205, 16 N. W. 87.

remove, or detain persons affected with, or who have been exposed to, contagious or infectious diseases.⁴⁴ It may regulate also the removal of dead animals and garbage,⁴⁵ and compel citizens to prepare the same for removal at minimum expense;⁴⁶ and generally may suppress nuisance to the public health.⁴⁷

Nuisances.

It is primarily within the power of a municipality to determine and declare what is a nuisance to health;⁴⁸ and the courts will not interfere with this discretion except in case of obvious abuse.⁴⁹ But whether a given thing is a nuisance is a question of fact, and it is not within the power of a municipal corporation arbitrarily and without support of reason or

⁴⁴ *HARRISON v. BALTIMORE*, 1 Gill (Md.) 264; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525; *City of Chicago v. Peck*, 98 Ill. App. 434; *Id.*, 196 Ill. 260, 63 N. E. 711; *Frazer v. Chicago*, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 306, 78 Am. St. Rep. 296; *City of Anderson v. O'Conner*, 98 Ind. 168.

⁴⁵ *Ex parte Casinello*, 62 Cal. 538; *In re Vandine*, 6 Pick. (Mass.) 187, 17 Am. Dec. 351; *Iler v. Ross*, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676; *Alpers v. San Francisco* (C. C.) 32 Fed. 503; *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *Smiley v. MacDonald*, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 684; *Schoen v. Atlanta*, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804; *Balch v. Utica*, 42 App. Div. 562, 59 N. Y. Supp. 513.

⁴⁶ *City of Grand Rapids v. De Vries*, *supra*; *Sanitary Reduction Works of San Francisco v. Reduction Co.* (C. C.) 94 Fed. 693.

⁴⁷ *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; *Hellen v. Noe*, 25 N. C. 493; *Ferguson v. Selma*, 43 Ala. 398; *Harvey v. Dewoody*, 18 Ark. 252; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251; *Kennedy v. Phelps*, 10 La. Ann. 227; *Smith v. Collier*, 118 Ga. 306, 45 S. E. 417; *Municipality No. 1 v. Wilson*, 5 La. Ann. 747; *Lake v. Aberdeen*, 57 Miss. 260; *Vason v. Augusta*, 38 Ga. 542; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354.

⁴⁸ *Laugel v. Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266; *HART v. MAYOR*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; *Harrison v. Baltimore*, 1 Gill (Md.) 264.

⁴⁹ *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

fact to declare that which is harmless a nuisance.⁵⁰ A corporation cannot make a thing a nuisance by declaring it so.⁵¹ "This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities."⁵² The power to regulate does not give power to prohibit;⁵³ and therefore a city may not absolutely forbid the sale of meat or secondhand clothing, or other lawful business not in itself necessarily a nuisance.⁵⁴ Ordinarily, the municipality must resort to the usual process of law to abate a health nuisance;⁵⁵ but the state may confer upon it the power of summary abatement in case of emergency.⁵⁶

⁵⁰ *Block v. Jacksonville*, 36 Ill. 301; *Nazworthy v. Sullivan*, 55 Ill. App. 48; *Everett v. Council Bluffs*, 46 Iowa, 66; *Tissot v. Telephone Co.*, 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248.

⁵¹ *Ward v. Little Rock*, 41 Ark. 526, 45 Am. Rep. 46; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Ex parte O'Leary*, 65 Miss. 80, 3 South. 144, 7 Am. St. Rep. 640; *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. See *City of Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548, where it was held that declaring the thing prohibited a public nuisance would be no ground for denying validity to the penal provision of the ordinance.

An ordinance which declares that a nuisance which is not a nuisance is unreasonable and void. *Munsell v. Carthage*, 105 Ill. App. 119; *City of Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *City of Carthage v. Duvall*, 105 Ill. App. 123. See, also, *Griffin v. Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684.

⁵² *Miller, J.*, in *YATES v. MILWAUKEE*, 10 Wall. (U. S.) 497, 19 L. Ed. 984.

⁵³ *State v. Taft*, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. Rep. 768.

⁵⁴ *Shiras v. Olinger*, 50 Iowa, 571, 33 Am. Rep. 138; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; *Town of Crowley v. West*, 52 La. Ann. 526, 27 South. 53, 47 L. R. A. 652, 78 Am. St. Rep. 355; *Harrison v. Brooks*, 20 Ga. 537.

⁵⁵ *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *City of Ottumwa v. Chinn*, 75 Iowa, 405, 39 N. W. 670; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106.

⁵⁶ *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Town of*

SAFETY.

122. The safety of life, limb and property being one of the prime objects of municipal incorporation, all appropriate regulations tending to promote this object are within the police power delegated to a municipality.

Health, good order, and safety being prime objects of civilization are the essential conditions of municipal life. It would be vain and useless to have good order and health in a city without security to person and property. Municipal corporations are therefore authorized in the exercise of police power to enact such ordinances and employ such necessary means as will insure safety to the private property as well as the persons of its citizens.⁵⁷ Fire has been recognized as the greatest municipal peril, and measures to prevent the rise and spread of conflagrations are universal.

Fire Limits.

A city may therefore prescribe fire limits, and forbid the erection of wooden buildings therein.⁵⁸ Most of the cases

Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89.

⁵⁷ *Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266; 2 Bac. Abr. 147; 2 Kent, Comm. 339.

A city has been held to have the right of legal exercise of the police power to require a railroad company to raise its tracks so as to do away with grade crossings. *Osburn v. Chicago*, 105 Ill. App. 217. And a city may compel persons owning or having charge of property, in front of which is a sidewalk unsafe by reason of ice or snow, to make the walk safe by removal of the snow, or covering the ice with sand, within a reasonable time. *State v. McMahon*, 76 Conn. 97, 55 Atl. 591.

⁵⁸ *Knoxville Corp. v. Bird*, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; *City of Troy v. Winters*, 4 Thomp. & C. (N. Y.) 256; *STATE v. JOHNSON*, 114 N. C. 846, 19 S. E. 599; *Hine v. New Haven*, 40 Conn. 478; *State v. O'Neill*, 49 La. Ann. 1171, 22 South. 352; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am.

hold such power to be inherent in the corporation,⁵⁹ but some hold that it must be expressly conferred.⁶⁰ A fire-limit ordinance will prevent the construction of wooden buildings previously projected and contracted for,⁶¹ and it has been held that a wooden building erected in violation thereof may be summarily removed.⁶² The decisions with regard to raising or repairing wooden buildings within fire limits are not harmonious; but the weight of authority seems to be that any enlarging or changing of a building or re-erection of one destroyed by fire, or removal, whether from without or within the fire limits, is an erection within the meaning of such or-

St. Rep. 180; *Id.*, 26 N. E. 184; *McCloskey v. Krelling*, 76 Cal. 511, 18 Pac. 433; *Eureka City v. Wilson*, 15 Utah, 67, 48 Pac. 150, 62 Am. St. Rep. 904; *Chimine v. Baker* (Tex. Civ. App.) 75 S. W. 330; *City of Roanoke v. Bolling* (Va.) 43 S. E. 343; *Ford v. Thralkill*, 84 Ga. 169, 10 S. E. 600.

⁵⁹ *Mayor, etc., of City of Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *Klingler v. Bickel*, 117 Pa. 326, 11 Atl. 555; *Commonwealth v. Tewksbury*, 11 Metc. (Mass.) 55; *Elchenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; *City of Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13.

⁶⁰ *City of Keokuk v. Scroggs*, 39 Iowa, 447; *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *City of Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. 136, 56 Am. Rep. 341; *Pratt v. Litchfield*, 62 Conn. 112, 25 Atl. 461.

⁶¹ *Knoxville Corp. v. Bird*, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; *City of Salem v. Maynes*, 123 Mass. 372.

⁶² *McKibbin v. Ft. Smith*, 35 Ark. 352; *Mayor, etc., of City of Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *Klingler v. Bickel*, 117 Pa. 326, 11 Atl. 555; *Hine v. New Haven*, 40 Conn. 478.

But an owner is entitled to a reasonable time in which to erect the kind of building required by the ordinance. *Lemmon v. Guthrie Center*, 113 Iowa, 36, 84 N. W. 986, 86 Am. St. Rep. 361.

See, also, *Griffin v. Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684; *Ward v. Murphysboro*, 77 Ill. App. 549.

dinance, and is unlawful.⁶³ A city may also pass ordinances prescribing the maximum quantity of gunpowder, dynamite, nitroglycerin, hay, excelsior, or other combustible or inflammable material which may be stored in one place or kept in one house in the city.⁶⁴ It may also prescribe and enforce the construction of fire escapes on all buildings not strictly private.⁶⁵ Ordinances may also be enacted prescribing safe chimneys, flues, and furnaces,⁶⁶ and regulating the handling of coals, ashes, and the like;⁶⁷ and, indeed, any other reasonable regulation to prevent and extinguish fires.

⁶³ *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *Eureka City v. Wilson*, 15 Utah, 57, 48 Pac. 150, 62 Am. St. Rep. 904; *Brady v. Insurance Co.*, 11 Mich. 425; *Griffin v. Gloversville*, supra. As to repairs, see *O'Brien v. Louer*, 158 Ind. 211, 61 N. E. 1004.

Contra, *Contas v. Bradford*, 206 Pa. 291, 55 Atl. 989; *Brown v. Hunn*, 27 Conn. 334, 71 Am. Dec. 71; *Borough of Stamford v. Studwell*, 60 Conn. 85, 21 Atl. 101.

⁶⁴ *Wright v. Railway Co.*, 27 Ill. App. 200 (petroleum); *City Council of Charleston v. Elford*, 1 McM. (S. C.) 234; *Clark v. South Bend*, 55 Ind. 276, 44 Am. Rep. 13; *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 694.

In *Dobbins v. Los Angeles*, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95, an ordinance making it unlawful to erect or maintain any works for the manufacture of gas within certain limits was held to be a legitimate exercise of the police power of the city.

⁶⁵ *Commonwealth v. Emsley*, 5 Pa. Co. Ct. R. 476; *Fire Department of New York v. Chapman*, 10 Daly (N. Y.) 377; *McCulloch v. Ayer* (C. C.) 96 Fed. 178; *City of New Orleans v. Danneman*, 51 La. Ann. 1093, 25 South. 931; *Fire Department of City of New York v. Sturtevant*, 33 Hun (N. Y.) 407; *Schmalzried v. White*, 97 Tenn. 37, 36 S. W. 393, 32 L. R. A. 782. See *De Ginther v. Home*, 58 N. J. Law, 354, 33 Atl. 968.

⁶⁶ *Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266; *Hennessy v. St. Paul* (C. C.) 37 Fed. 565; *City Council of Charleston v. Blake*, 12 Rich. Law (S. C.) 66; *Same v. Palmer*, 1 McCord (S. C.) 342.

⁶⁷ *Iler v. Ross*, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676; *Inhabitants of Winthrop v. Chocolate Co.*, 180 Mass. 464, 62 N. E. 969; 1 Dill. Mun. Corp. § 143.

Fire Apparatus.

Express authority is usually conferred by charter for the organization of a fire department and the purchase of the necessary fire engines, hose carts, hook and ladder wagons, and other appropriate apparatus for extinguishing fires and maintaining the department. But it has been held that such power is inherent, or at least may be implied, and that the corporation may lawfully appropriate money for these purposes without express authority.⁶⁸

Stopping Conflagration.

The supreme exercise of police power by a municipality for public safety is displayed in razing, in case of emergency, valuable private property to prevent the spread of conflagration.⁶⁹ This may be done without incurring any liability whatever to the owner, unless compensation has been provided by statute; the rule at common law being that the state might destroy, though it could not take private property without compensation.⁷⁰

Speed Regulations.

Another source of danger to public safety in a city is rapid locomotion in or across the streets thereof. Municipalities have authority to regulate the movement not only of railroad trains, street cars, omnibuses, hacks, automobiles,⁷¹ but also

⁶⁸ *Corporation of Bluffton v. Studabaker*, 106 Ind. 129, 6 N. E. 1; *Green v. Cape May*, 41 N. J. Law, 45; *Allen v. Taunton*, 19 Pick. (Mass.) 485.

⁶⁹ *Smith v. Rochester*, 76 N. Y. 506; *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 907.

⁷⁰ *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *White v. Charleston*, 2 Hill (S. C.) 571; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980.

⁷¹ *Taylor v. Railroad Co.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457; *Haas v. Railway Co.*, 41 Wis. 44; *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; *Whitson v. Franklin*, 34 Ind. 392; *City of Buffalo v. Railroad Co.*, 152 N. Y. 276, 46 N. E. 496.

But an ordinance prohibiting driving on the streets at a rate

individuals moving on horseback, bicycles, and other vehicles,⁷² and likewise to regulate the movement of water craft in the waters over which they have jurisdiction.⁷³ Municipal ordinances have been sustained which restrict the running of trains within corporate limits to four miles an hour,⁷⁴ require flagmen to be kept at street crossings,⁷⁵ and those requiring a conductor on each street car,⁷⁶ and many similar ordinances regulating speed and movements within the municipal jurisdiction whereby collisions may be avoided and human life and property saved from needless injury or reckless destruction.⁷⁷

Dangerous Forces.

Municipal corporations also exercise the police power in the supervision and regulation of occupations which are essentially dangerous in their nature or conduct, and sometimes entirely exclude them from the municipal limits.⁷⁸ To this class belong those occupations which produce, transmit, or re-

greater than six miles an hour is, as to members of the fire department, invalid. *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305; *Kahn v. Eisler*, 22 Misc. Rep. 350, 49 N. Y. Supp. 135.

⁷² *Taylor v. Chandler*, 9 Helsk. (Tenn.) 349, 24 Am. Rep. 308; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; *Nealis v. Hayward*, 48 Ind. 19; *Washington v. Nashville*, 1 Swan (Tenn.) 177.

⁷³ *Backus v. Detroit*, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447.

⁷⁴ *Knobloch v. Railroad Co.*, 31 Minn. 402, 18 N. W. 106.

⁷⁵ *Toledo, W. & W. Ry. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611. And to erect safety gates at certain street crossings. *Chesapeake & O. Ry. Co. v. Maysville*, 60 S. W. 728, 24 Ky. Law Rep. 615.

⁷⁶ *SOUTH COVINGTON & C. RY. CO. v. BERRY*, 18 S. W. 1026, 13 Ky. Law Rep. 943.

⁷⁷ *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill (N. Y.) 209; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

⁷⁸ *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734; *Mayor of New York v. Ordrenan*, 12 Johns. (N. Y.) 122.

quire great power, or expose to special danger,⁷⁹ steam engines, electric plants, elevators, and the like, which the municipality usually exercises supervision or license.⁸⁰

COMFORT.

123. The public comfort and convenience is also one of the objects of municipal incorporation, and is promoted by the exercise of the police power.

This exercise of the police power finds expression in the Blackstone definition that "individuals are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent and civil." Whatever, therefore, causes public discomfort or inconvenience or immorality may be prevented in the exercise of the police power.⁸¹ This includes not only cond

⁷⁹ *Davenport v. Richmond City*, 81 Va. 636, 59 Am. E. 101; *Stanley v. Davenport*, 54 Iowa, 463, 2 N. W. 1064, 37 Am. E. 101.

But see *Richmond Safety Gate Co. v. Ashbridge* (C. C.) 220.

⁸⁰ *City of St. Louis v. Meyrose Lamp Mfg. Co.*, 139 Mo. 244, 61 Am. St. Rep. 474.

But where the business is subjected to inspection, the control must not be unreasonable. *City of Saginaw v. L. L. Saginaw*, 113 Mich. 660, 72 N. W. 6; *City of Joplin v. Leckie*, 78 Mo. 8. See *City of Cape May v. Transportation Co.*, 64 N. J. 44 Atl. 948.

⁸¹ *Whitmier & Filbrick Co. v. Buffalo* (C. C.) 118 Fed. 101 (board). Imposing a penalty upon a manufacturer for not constructing the furnaces as to consume the smoke is a proper exercise of the police power. *Department of Health of City of New York v. Brewing Co.* (Mun. Ct.) 78 N. Y. Supp. 11.

Under an investiture in municipal corporations of power to abate annoyance within their limits, to abate nuisance, and to enforce ordinances to carry into effect such power, the enactment of an ordinance prohibiting the keeping of a jackass within its hearing distance of its populace, and declaring such keeping a nuisance, was held to be a valid exercise of the police power. *parte Foote*, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63.

acts recognized by the common law as essentially evil—*mala in se* or *mala prohibita*—but even things not unlawful, which cause the public hurt, damage, or harm, and thus become nuisances.⁸² It has accordingly been held that a city may prohibit public profanity,⁸³ street preaching,⁸⁴ public drunkenness,⁸⁵ carrying concealed weapons,⁸⁶ rock blasting,⁸⁷ vagrancy,⁸⁸ cruelty to animals,⁸⁹ Sabbath breaking,⁹⁰ destruction of public trees,⁹¹ steam whistle blowing,⁹² and the running at large of animals.⁹³ Animals found running at large in a

⁸² *HART v. MAYOR*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465; *Hellen v. Noe*, 25 N. C. 493; *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; *Kennedy v. Phelps*, 10 La. Ann. 227; *City of Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486; *Ferguson v. Selma*, 43 Ala. 398.

⁸³ *State v. Cainan*, 94 N. C. 880; *State v. Ernhardt*, 107 N. C. 789, 12 S. E. 426; *Ex parte Delaney*, 43 Cal. 478.

⁸⁴ *City of Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *City of Bloomington v. Richardson*, 38 Ill. App. 60; *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577.

⁸⁵ *Town of Bloomfield v. Trimble*, 54 Iowa, 399, 6 N. W. 586, 37 Am. Rep. 212; *Homer v. Blackburn*, 27 La. Ann. 544. Cf. *State v. Bruckhauser*, 26 Minn. 301, 3 N. W. 695.

⁸⁶ *In re Cheney*, 90 Cal. 617, 27 Pac. 436.

But in *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413, it was held that the carrying of concealed weapons did not amount to a breach of the peace, and could not be made an offense, and punishable by municipal ordinance, unless expressly authorized by municipal charter.

⁸⁷ *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174.

⁸⁸ *City of St. Louis v. Bentz*, 11 Mo. 61; *Byers v. Commonwealth*, 42 Pa. 89.

⁸⁹ *City of St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791.

⁹⁰ *City of Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553; *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; *Mayor of Nashville v. Linck*, 12 Lea (Tenn.) 499; *City of Cincinnati v. Rice*, 15 Ohio, 225; *State v. Welch*, 36 Conn. 215.

⁹¹ *State v. Merrill*, 37 Me. 329.

⁹² 1 Dill. Mun. Corp. § 374, note p. 448.

⁹³ *Amyx v. Taber*, 23 Cal. 370; *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *COCHRANE v. FROSTBURG*, 81 Md. 54, 31 Atl. 703,

municipality may be impounded, and, after due time for redemption and notice to the owner, may be sold,⁹⁴ if not redeemed, unless a different penalty is provided, in which case only the penalty prescribed can be enforced.⁹⁵ And so, under authority to impose a fine only, the city cannot pass an ordinance authorizing that vagrant hogs be killed and appropriated by the officer.⁹⁶ A municipal corporation may, in the exercise of police power, require a license for the keeping of dogs; the same being held not unconstitutional for inequality of taxation or undue restriction upon the right to own property.⁹⁷

27 L. R. A. 728, 48 Am. St. Rep. 479; *Hellen v. Noe*, 25 N. C. 493; *City of Chattanooga v. Norman*, 92 Tenn. 73, 20 S. W. 417; *Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217; *Irwin v. Mattox*, 138 Pa. 466, 21 Atl. 209; *City of Hagerstown v. Witmer*, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649.

⁹⁴ *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 299; *Gosselink v. Campbell*, 4 Iowa, 296; *Gilchrist v. Schmidling*, 12 Kan. 263; *Hellen v. Noe*, *supra*.

An ordinance providing that an animal found running at large within the city limits may be impounded and sold, and this though the owner is a nonresident of the city, is a valid exercise of the police power. *Jeans v. Morrison*, 99 Mo. App. 208, 73 S. W. 235. And it makes no difference whether the animals escape by reason of the owner's negligence or not. *Dorton v. Burks*, 99 Mo. App. 165, 73 S. W. 239. See, also, *Thompson v. Millen*, 24 Ky. Law Rep. 2479, 74 S. W. 288; *McVey v. Barker*, 92 Mo. App. 498; *Folmar v. Curtis*, 86 Ala. 354, 5 South. 678; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Roberts v. —*, *supra*; *Horney v. Sloan*, 1 Ind. 266; *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Whitfield v. Longest*, 28 N. C. 268.

⁹⁵ *City of Cartersville v. Lanham*, 67 Ga. 753; *Brophy v. Hyatt*, *supra*.

⁹⁶ *Donovan v. Vicksburg*, 20 Miss. 247, 64 Am. Dec. 143; *Kennedy v. Sowden*, 1 McMull. (S. C.) 328, citing *McRea v. Olain*, an unreported case. And the owner of such hogs may be fined, whether he live inside or out of the city limits. *Jones v. Duncan*, 127 N. C. 118, 37 S. E. 135.

⁹⁷ *Washington v. Lynch*, 5 Cranch, C. C. 498, Fed. Cas. No. 17,231; *Carthage v. Rhodes*, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352; *City of Faribault v. Wilson*, 34 Minn. 254, 25 N. W. 449; *Blair v.*

OCCUPATIONS AND AMUSEMENTS.

124. The city possesses no power to prohibit a useful business or a harmless amusement; but all manner of occupations and amusements are subject to reasonable regulation by the state or the municipality exercising the delegated police power.

Occupations or amusements which are immoral, illegal, or harmful to the city, such as gambling, liquor selling, and the like, may be entirely prohibited;⁹⁸ but a municipality has no authority to interfere with private rights of lawful occupation and amusement beyond necessary regulation.⁹⁹ A city may prohibit the keeping of a house of ill fame,¹⁰⁰ or the leasing of property for that purpose;¹⁰¹ and so, also, for gambling or liquor selling, if authorized by charter;¹⁰² or, if these practices are not forbidden, the city may adopt and enforce stringent regulations for them. It may prohibit the

Forehand, 100 Mass. 136, 97 Dec. 82, 1 Am. Rep. 94; *State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *Griggs v. Macon*, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134; *Hill v. Abbeville*, 59 S. C. 396, 38 S. E. 11.

⁹⁸ *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173.

⁹⁹ *Muhlenbrinck v. Long Branch*, 42 N. J. Law, 364, 36 Am. Rep. 518; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *City of Buffalo v. Baking Co.*, 24 Misc. Rep. 745, 53 N. Y. Supp. 968; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *State v. Owen*, 50 La. Ann. 1181, 24 South. 187.

¹⁰⁰ *People v. Miller*, 38 Hun (N. Y.) 82; *State v. Williams*, 11 S. C. 288; *Childress v. Nashville*, 3 Sneed (Tenn.) 347; *City of Shreveport v. Roos*, 35 La. Ann. 1010. Cf. *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471.

¹⁰¹ *L'Hote v. New Orleans*, 51 La. Ann. 98, 24 South. 608, 44 L. R. A. 90; *McAlister v. Clark*, 33 Conn. 91; *Childress v. Nashville*, 3 Sneed (Tenn.) 347, 356.

Contra, *State v. Webber*, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

¹⁰² *State v. Grimes*, 49 Minn. 443, 52 N. W. 42; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

sale of liquors and wines at places of musical or dramatic entertainment where females act as waiters,¹⁰³ and may fix hours for closing and opening saloons,¹⁰⁴ and forbid admission of minors or females;¹⁰⁵ and in general may enact such ordinances as will tend to prevent such places from degenerating into nuisances or breeding disorder and crime.¹⁰⁶

License.

Even where a privilege license may not be required as a means of municipal revenue, a city may, under the police power, require license for any profession, trade, or business the supervision of which tends to promote municipal health, safety, order, or welfare;¹⁰⁷ and this either because the trade or profession requires a certain degree of skill or training,¹⁰⁸ or because it furnishes opportunities for fraud,¹⁰⁹ or because proper municipal police demands record of the persons engaged in various occupations.¹¹⁰ But authority to require license has been declared not to be inherent in the municipality.¹¹¹ It must be expressly given or readily implied from

¹⁰³ *Ex parte Hayes*, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701.

¹⁰⁴ *Smith v. Knoxville*, 3 Head (Tenn.) 245; *Maxwell v. Jonesboro*, 11 Heisk. (Tenn.) 257.

¹⁰⁵ *City of Plattsburg v. Trimble*, 46 Mo. App. 459; *Bergman v. Cleveland*, 89 Ohio St. 651.

¹⁰⁶ *City of Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361.

¹⁰⁷ *Nolln v. Franklin*, 4 Yerg. (Tenn.) 163; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *St. Louis v. Fitz*, 53 Mo. 582; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *Hill v. Abbeville*, 59 S. C. 396, 38 S. E. 11.

¹⁰⁸ *Simmons v. State*, 12 Mo. 268, 49 Am. Dec. 131; *Nashville, C. & St. L. R. Co. v. Atlanta*, 118 Ala. 362, 24 South. 450; *City of Savannah v. Charlton*, 36 Ga. 460; *State v. Hibbard*, 3 Ohio, 63.

¹⁰⁹ *Ward v. Farwell*, 97 Ill. 593; *Lothrop v. Stedman*, 42 Conn. 583, Fed. Cas. No. 8,519; *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *City of Boston v. Schaffer*, 9 Pick. (Mass.) 415; *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *Ex parte Ah Foy*, 57 Cal. 92.

¹¹⁰ *Tied. Ldm. § 101*; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 604; *Blydenburgh v. Miles*, 39 Conn. 484; *Borough of Warren v. Geer*, 117 Pa. 207, 11 Atl. 415.

¹¹¹ *State v. McMahon*, 69 Minn. 265, 72 N. W. 79, 38 L. R. A.

the charter, or it will not exist in case of ordinary occupation.¹¹² And the cost of such license must not exceed the reasonable expense of municipal supervision.¹¹³ Accordingly, a license charge of \$40 per year on hacks has been held unlawful.¹¹⁴ Ordinances requiring licenses from peddlers,¹¹⁵ plumbers,¹¹⁶ auctioneers,¹¹⁷ bakers,¹¹⁸ draymen,¹¹⁹ hackmen,¹²⁰ green grocers,¹²¹ pawnbrokers,¹²² milk dealers,¹²³

675; *Ex parte Garza*, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

¹¹² *State v. Itzcovitch*, 49 La. Ann. 366, 21 South. 544, 37 L. R. A. 673, 62 Am. St. Rep. 648.

¹¹³ *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *State v. Cassidy*, 22 Minn. 321, 21 Am. Rep. 765.

¹¹⁴ *City of Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367.

¹¹⁵ *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 20 L. R. A. 531.

¹¹⁶ *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182.

¹¹⁷ *Town of Decorah v. Dunstan*, 38 Iowa, 96; *Fretwell v. Troy*, 18 Kan. 271; *Wiggins v. Chicago*, 68 Ill. 372.

¹¹⁸ *PEOPLE v. WAGNER*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141.

¹¹⁹ *CITY OF BROOKLYN v. BRESLIN*, 57 N. Y. 591; *City of Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593.

¹²⁰ *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Commonwealth v. Page*, 155 Mass. 227, 29 N. E. 512; *Haynes v. Cape May*, 52 N. J. Law, 180, 19 Atl. 176.

Hackmen may be required, under police power, to occupy certain designated places at depots. *City of Ottawa v. Bodley*, 67 Kan. 178, 72 Pac. 545. See *Combs v. Lakewood Tp.*, 68 N. J. Law, 582, 53 Atl. 697; *City of New York v. Reesing*, 77 App. Div. 417, 79 N. Y. Supp. 331; *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136.

¹²¹ *Frommer v. Richmond*, 31 Grat. 646, 31 Am. Rep. 746.

¹²² *Lauder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625; *Shuman v. Ft. Wayne*, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; *City of St. Paul v. Lytle*, 69 Minn. 1, 71 N. W. 703.

¹²³ *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *City of Chicago v. Bartee*, 100 Ill. 57; *City of Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771.

But see, *contra*, *State v. Tyrrell*, 73 Conn. 407, 47 Atl. 686, where

billiard saloons,¹²⁴ livery stables,¹²⁵ showmen,¹²⁶ hucksters,¹²⁷ lawyers and doctors,¹²⁸ bankers,¹²⁹ junk shops,¹³⁰ telegraph companies,¹³¹ natural gas companies,¹³² pharmacists,¹³³ have been held valid under the police power. But the courts have repeatedly held such ordinances to be invalid, as unlawful interference with private rights under the pretext of police regulation, when it is apparent that the end sought is not the promotion of the public health, morals, or welfare.¹³⁴ The limit of the power is to prevent injury and regulate what is not harmful. A laundry may not be declared unlawful,¹³⁵

an ordinance requiring milk dealers to obtain a municipal license was held invalid, as being in conflict with the General Statutes of the state, and beyond the power of the city council to enact.

¹²⁴ *In re Snell*, 58 Vt. 207, 1 Atl. 566.

¹²⁵ *Municipality No. 2 v. Dubois*, 10 La. Ann. 56.

¹²⁶ *City of Boston v. Schaffer*, 9 Pick. (Mass.) 415.

¹²⁷ *Frommer v. Richmond*, 31 Grat. (Va.) 646, 31 Am. Rep. 746; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *City of Huntington v. Cheesbro*, 57 Ind. 74; *State v. Smith*, 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301.

¹²⁸ *Young v. Thomas*, 17 Fla. 169, 35 Am. Rep. 93; *City of Girard v. Bissell*, 45 Kan. 66, 25 Pac. 232; *City of Savannah v. Charlton*, 36 Ga. 460; *State v. Proudft*, 3 Ohio, 63; *Ahlrichs v. Cullman*, 130 Ala. 674, 31 South. 1045; *Elliott v. Louisville*, 101 Ky. 262, 40 S. W. 690; *State v. Fernandez*, 49 La. Ann. 764, 21 South. 591. Cf. *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

¹²⁹ *Oil City v. Trust Co.*, 11 Pa. Co. Ct. R. 350.

¹³⁰ *City Council of Charleston v. Goldsmith*, 12 Rich. (S. C.) Law, 470.

¹³¹ *City of Allentown v. Telegraph Co.*, 148 Pa. 117, 23 N. E. 1070, 33 Am. St. Rep. 820; *Hodges v. Telegraph Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Borough of New Hope v. Telegraph Co.*, 16 Pa. Super. Ct. 306; *Taylor v. Cable Co.*, 16 Pa. Super. Ct. 344.

¹³² *Rushville Gas Co. v. Rushville*, 121 Ind. 212, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388.

¹³³ *People v. Rontey*, 51 Hun, 640, 4 N. Y. Supp. 235.

¹³⁴ *Robinson v. Mayor*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625; *Bethune v. Hughes*, 28 Ga. 560, 73 Am. Dec. 780; *Caldwell v. Alton*, 33 Ill. 416, 75 Am. Dec. 282; *White v. Kent*, 11 Ohio St. 550.

¹³⁵ *YICK WO v. HOPKINS*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L.

but the business may be lawfully confined within certain localities, and restricted to certain hours.¹³⁶

Liquor Selling.

Municipal restraint upon the subject of liquor selling is now comparatively rare because of the control of this traffic by state and federal laws. The municipal corporation possesses no inherent power over this traffic, but only the express and implied powers conferred by the charter.¹³⁷ Wherever the power of regulation is conferred, the municipality may require a license,¹³⁸ may forbid the employment of women in the traffic,¹³⁹ may confine sales within reasonable hours¹⁴⁰ and within prescribed territorial limits,¹⁴¹ and may regulate the traffic by other wholesome restrictions.¹⁴²

Ed. 220; *State v. Taft*, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. Rep. 768.

¹³⁶ *BARBIER v. CONNOLLY*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

The city may also pass ordinances requiring the inspection of laundries, and may provide for a reasonable fee to be paid to cover the cost of such inspection. *City of New Orleans v. Hop Lee*, 104 La. 601, 29 South. 214.

¹³⁷ *Loeb v. Attica*, 82 Ind. 175, 42 Am. Rep. 494; *In re Burnett*, 30 Ala. 461; *Ex parte Campbell*, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418.

¹³⁸ *Bancroft v. Dumas*, 21 Vt. 456; *Thomasson v. State*, 15 Ind. 449; *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773; *City of Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221; *Schweitzer v. Liberty*, 82 Mo. 309; *Charleston City Council v. Heisembittel City Council*, 2 McMul. (S. C.) Law, 233.

¹³⁹ *Bergman v. Cleveland*, 39 Ohio St. 651.

¹⁴⁰ *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768; *State v. Welch*, 36 Conn. 215; *Morris v. Rome*, 10 Ga. 532; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660.

¹⁴¹ *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611; *People v. Cregier*, 138 Ill. 401, 28 N. E. 812; *In re Wilson*, 32 Minn. 145, 19 N. W. 723.

¹⁴² *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; *Decie v. Brown*, 167 Mass. 290, 45 N. E. 765; *Provo City v. Shurtliff*.

MARKETS.

125. The establishment and regulation of municipal markets is a proper exercise of the police power for the convenience, health, and general welfare of the municipality. A municipal market is a designated place in a town or city, with convenient fixtures for the sale of provisions and articles of daily consumption, with proper regulations and officers, where all persons may lawfully be for the purpose of buying or selling.

In England the market has been time out of mind an essential part of the municipality, generally regarded as a prescriptive right or power, with certain customary regulations and privileges.¹⁴³ In America the establishment and regulation of markets is generally granted by charter; and after much contention it has been generally decided that the city may prohibit the sale of fresh meat, vegetables, and other provisions elsewhere than in the public market,¹⁴⁴ upon the ground, as stated in a leading Louisiana case, that "the privilege of keeping a private market is subordinate to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity."¹⁴⁵ In the

4 Utah, 15, 5 Pac. 302; *Metcalf v. State*, 76 Ga. 208; *Ex parte Hayes*, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; *State v. Hellman*, 56 Conn. 190, 14 Atl. 806.

¹⁴³ 2 Bl. Comm. 37; *Grant, Corp.* 166; 1 Dill. Mun. Corp. § 380.

¹⁴⁴ *First Municipality v. Cutting*, 4 La. Ann. 335; *Newson v. Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558; *Commonwealth v. Rice*, 9 Metc. (Mass.) 253; *State v. Smith (Iowa)* 96 N. W. 809; *Town of Crowley v. Rucker*, 107 La. 213, 31 South. 629; *City of Buffalo v. Hill*, 79 App. Div. 402, 79 N. Y. Supp. 449; *CITY OF BROOKLYN v. BRESLIN*, 57 N. Y. 591; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 200; *Wartman v. Philadelphia*, 33 Pa. 202.

¹⁴⁵ *City of New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563.

exercise of this power the city may require the payment of a license fee for market privileges,¹⁴⁶ may fix market hours,¹⁴⁷ may prohibit street vending,¹⁴⁸ and provide for inspection and weighing of market articles.¹⁴⁹ Market ordinances like those above mentioned have been generally sustained by the courts upon the express view that they are not in restraint of trade, but for the wholesome regulation of it, and in the lawful exercise of the police power.¹⁵⁰

VIOLATION AND ENFORCEMENT.

126. Violations of police regulations are usually punished by a court proceeding in personam for the recovery or enforcement of the affixed penalty, but in many cases the police power is enforced in rem in a summary manner.

As we have heretofore seen,¹⁵¹ the proceeding for violation of municipal ordinances is variously viewed in the courts of the several states; but all concur that no judgment can be pronounced or penalty inflicted in personam except through some regular judicial proceeding.¹⁵² This rule applies to the

¹⁴⁶ *CITY OF CINCINNATI v. BUCKINGHAM*, 10 Ohio, 257; *Blanchard v. Ivers*, 40 Fla. 117, 24 South. 66.

¹⁴⁷ *City of Bowling Green v. Carson*, 10 Bush (Ky.) 64.

¹⁴⁸ *Lauder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625.

¹⁴⁹ *Taylor v. Pine Bluff*, 34 Ark. 603; *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Pierce v. Kimball*, 9 Greenl. (Me.) 54, 23 Am. Dec. 539; *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Hoffman v. Jersey City*, 34 N. J. Law, 172; *Wartman v. Philadelphia*, 33 Pa. 202; *State v. Smith* (Iowa) 96 N. W. 899.

Also a municipality may require that coal be weighed on the city scales. *Wills v. Ft. Smith*, 70 Ark. 221, 66 S. W. 922.

¹⁵⁰ *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; *Taylor v. Pine Bluff*, supra; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *Badkins v. Robinson*, 53 Ga. 613; *Yates v. Milwaukee*, 12 Wis. 673.

¹⁵¹ Ante, § 76.

¹⁵² *Cooley*, Const. Lim. (6th Ed.) 431 et seq.; *Meaher v. Chattanooga*,

enforcement of police regulations as well as to other ordinances. Trial and conviction without a jury is called by some judges a summary proceeding;¹⁵³ but herein the word "summary" is used to describe an extrajudicial enforcement of the police power in a summary manner without legal process. For example, a city council has power to confer upon the board of health authority to demolish a house infected with smallpox as a nuisance dangerous to the public health.¹⁵⁴ So, also, it has been held that a city may order a wooden house to be torn down which is built within the fire limits in defiance of the ordinance forbidding it;¹⁵⁵ and, as we have seen, the municipal corporation, without either statute or ordinance, may cause a private building to be demolished to stop conflagration.¹⁵⁶ So, too, a ferocious dog, or any other animal damage feasant in a municipality, may be killed, if necessary;¹⁵⁷ also a vagrant dog, unmuzzled, and addicted to biting, though doing no harm at the time, may be summarily killed as a measure of precaution.¹⁵⁸ In some states, too, the

1 Head (Tenn.) 74; *Lanfear v. Mayor*, 4 La. 97, 23 Am. Dec. 477; *State v. Lockwood*, 43 Wis. 403; *Town of Brookville v. Gagle*, 73 Ind. 117. See, also, *Blanchard v. Bristol*, 100 Va. 469, 41 S. E. 948.

¹⁵³ *Strong, J.*, in *Byers v. Commonwealth*, 42 Pa. 94.

¹⁵⁴ *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Waters v. Townsend*, 65 Ark. 613, 47 S. W. 1054; *Thellan v. Porter*, 14 Lea (Tenn.) 622, 52 Am. Rep. 173.

¹⁵⁵ *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *City of Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *McKibbin v. Ft. Smith*, 35 Ark. 352; *State v. Knoxville*, 12 Lea (Tenn.) 146, 47 Am. Rep. 331; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

¹⁵⁶ Ante, § 122.

¹⁵⁷ *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35.

¹⁵⁸ *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Slimmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253; *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677; *Ranson v. Kitner*, 31 Ill. App. 241; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749.

police are authorized to kill all unlicensed dogs wheresoever found.¹⁸⁹ Similar to this is the summary arrest and confinement by the police in the lockup of persons of the drunk and disorderly class, and, as we have seen,¹⁹⁰ the use of force, even to mayhem or death, if necessary, to disperse a mob or quell a riot.

¹⁸⁹ *Mowery v. Salisbury*, 82 N. C. 175; *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94; *State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *Julienne v. Jackson*, 67 Miss. 34, 10 South. 43, 30 Am. St. Rep. 528.

¹⁹⁰ Ante, § 117; *DARGAN v. MOBILE*, 31 Ala. 469, 70 Am. Dec. 505; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218.

But a municipal corporation cannot maintain a suit for a violation of one of the criminal statutes of the state. *McMinnville v. Stroud*, 109 Tenn. 369, 72 S. W. 949.

CHAPTER XV.

STREETS, SEWERS, PARKS, AND PUBLIC BUILDINGS.

- 127. Streets.
- 128. Legislative Control.
- 129. Delegation.
- 130. Dedication and Acceptance.
- 131. Use of Streets.
- 132. Abutting Owners.
- 133. Sewers.
- 134. Parks.
- 135. Public Buildings.

STREETS.

127. "Street" is a generic term usually employed to describe any public highway, whether improved or unimproved, lawfully established and opened in a municipality to the public use for travel and traffic.

In its legal acceptation, this word embraces not only streets, but also avenues and alleys, thus including the narrow and squalid and the broad and salubrious as well as the ordinary municipal highways.¹ It is public as distinguished from those private ways in a municipality which have not been dedicated to or accepted for public use, but are owned and enjoyed by private persons.² A turnpike owned by a private corporation is not, therefore, properly called a street.³ The term is used

¹ Elliott, *Roads & S.* c. 2; *Cox v. Railroad Co.*, 48 Ind. 178; *Heiple v. East Portland*, 13 Or. 97, 8 Pac. 907; *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560; *Village of Marseilles v. Howland*, 124 Ill. 551, 16 N. E. 883.

² *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Henkel v. Detroit*, 49 Mich. 249, 18 N. W. 611, 43 Am. Rep. 464; *Hamilton v. Railroad Co.*, 124 Ill. 241, 15 N. E. 854.

³ Elliott, *Roads & S.* p. 60; *Parker v. New Brunswick*, 30 N. J.

to describe any public road inside municipal boundaries, and does not properly embrace rural or suburban roads.⁴ Whenever duly established and opened, it becomes a street, whether it is worked upon and improved, or left in its natural state. It is dedicated to the public and accepted and held by it for the public use of trade and travel, and may not be perverted to other uses.⁵

LEGISLATIVE CONTROL.

128. The supreme power over streets, as over public highways, is inherent in the state, for the public use.

The state, as the sovereign agency of the people for the purposes of government, holds all public powers and utilities in trust for the public welfare, including those within as well as those beyond municipal boundaries.⁶ Its proper function is to decide what conveniences the public may enjoy for traffic and travel. Within constitutional limitations, it may determine when, where, and how streets, as other public highways, shall be opened, graduated, improved, and regulated;⁷ and,

Law, 395; *Wilson v. Allegheny*, 79 Pa. 272; *Henkel v. Detroit*, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464.

⁴ *City of Indianapolis v. Croas*, 7 Ind. 9; *Cowan's Case*, 1 Overt. (Tenn.) 311; *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560; *Heiple v. East Portland*, 13 Or. 97, 8 Pac. 907.

⁵ *Brabon v. Seattle* (Wash.) 69 Pac. 365; *John Anisfield Co. v. Edward B. Grossman & Co.*, 98 Ill. App. 180; *Brace v. Railroad Co.*, 27 N. Y. 271; *Dexter v. Tree*, 117 Ill. 535, 6 N. E. 506; *Townsend v. Epstein*, 98 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117.

⁶ *Kreigh v. Chicago*, 86 Ill. 407; *Elliott, Roads & S.* § 656; *Astor v. Mayor*, 62 N. Y. 567.

⁷ *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *Barrows v. Sycamore*, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. Rep. 400; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; *Daley v. St. Paul*, 7 Minn. 390 (Gil. 311); *Baird v. Rice*, 63 Pa. 489.

A city council may prescribe by resolution that portion of a street

though a street is used by the public for the purposes of travel and traffic, the state may determine and declare the manner of the use of particular streets, excluding traffic from some, and allowing railroads or street cars upon them, as it deems best;⁸ and it has even been held that the state may allow barriers, such as tollgates, to be erected upon them.⁹ The state may also vacate streets and close them to the public when it sees fit, but not so as to destroy the vested rights of abutting proprietors.¹⁰ These powers of control and regulation, of course, are legislative in their nature, and are subject

which shall be used as a sidewalk. *Cox v. Lancaster*, 24 Ohio Cir. Ct. R. 265.

A public street is a passage open to all the citizens of the state to go and to return, subject to the law of the road. No one man or body of men has a superior right upon and in the street as against the general public. *Chicago Union Traction Co. v. Stanford*, 104 Ill. App. 99.

⁸ *PEOPLE v. KERR*, 27 N. Y. 188; *Town of Arcata v. Railroad Co.*, 92 Cal. 639, 28 Pac. 676; *Floyd Co. v. Railroad Co.*, 77 Ga. 614, 3 S. E. 3.

⁹ *Millarkey v. Foster*, 6 Or. 378, 25 Am. Rep. 531; *Stormfeltz v. Turnpike Co.*, 13 Pa. 555.

¹⁰ *Mahady v. Bushwick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *Elliott, Mun. Corp.* § 399.

Nonuser of a portion of a street cannot operate as a surrender or abandonment of the same for the purposes of a public street. *City of Madison v. Mayers*, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127. But a city council having been given no authority to vacate or abandon the public easement of a street, an attempted abandonment of such easement by the city is *ultra vires*. *Macintosh v. Nome*, 1 Alaska, 492.

Mere inconvenience to a property owner from the vacation of a street, which will also result to the general public, does not warrant injunctive relief. *Hall v. Lebanon*, 31 Ind. App. 265, 67 N. E. 703.

An abutting owner is entitled to an easement in the full length of the street, and not merely to that part of the street directly in front and between the lines of the lot. *Healey v. Kelly*, 24 R. I. 581, 54 Atl. 588.

to judicial control only when legislative acts transcend constitutional limitations.¹¹

DELEGATION.

129. The legislative control over streets may be, and usually is, delegated to the municipality, and the power thus conferred upon it to open, graduate, improve, regulate, and close its own streets.

This municipal power to control its own streets depends entirely upon the provisions of the charter or the general statutes.¹² In some cases the power granted has been held to be unlimited, and the municipality vested with all the inherent power of control over the streets primarily possessed by the state.¹³ The grant is usually expressed in general terms, such as to lay out, open, grade, and otherwise improve streets and

¹¹ Where the legislature has vested in a village board discretionary power to vacate streets of the village, the courts will not ordinarily look into the motives influencing such board in doing such discretionary act. *Village of Bellevue v. Improvement Co.*, 65 Neb. 52, 90 N. W. 1002; *People v. Fields*, 58 N. Y. 491; *OLIVER v. WORCESTER*, 102 Mass. 489, 3 Am. Rep. 485; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711.

¹² Municipal corporations have no inherent power to regulate and control streets therein, for streets and highways belonging to the state are under its control. *Raynolds v. Cleveland*, 24 Ohio Cir. Ct. R. 215.

See *Kean v. Elizabeth*, 55 N. J. Law, 337, 26 Atl. 939; *McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896; *Citizens' St. R. Co. v. Memphis*, 53 Fed. 715; *Shirk v. Chicago*, 195 Ill. 298, 63 N. E. 193.

Municipal corporations have the power to grant franchises to use streets for street railway purposes only by delegation from the state. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. See, also, *State v. Yopp*, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714.

¹³ *City of Terre Haute v. Turner*, 36 Ind. 522; *Illinois Cent. R. Co. v. Galena*, 40 Ill. 344; *Sinton v. Ashbury*, 41 Cal. 525; *City R. Co. v. Railroad Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

keep them in repair;¹⁴ or to have power over its streets;¹⁵ or to have the care, supervision, and control of its streets.¹⁶ These general grants of authority by the state over its own streets, to its duly authorized general agent, to do whatever the state might do in controlling them, are held to confer plenary powers upon the municipality.¹⁷ The grant of power may, however, be partial, so that the state shall reserve to itself the sovereign power of exercising the right of eminent domain,¹⁸ or the power to determine what streets may be occupied by street cars or common railways,¹⁹ and also the designation of particular limits within the city wherein certain trades or business may be carried on.²⁰ It has been held that a state may delegate its control to two public corporations within the same territory;²¹ but, because of the confusion and conflict likely to result from this double delegation of power, the courts will recognize it only when expressed in unmis-

¹⁴ But a grant of power to establish, regulate and control streets, given at a time when street railways were not contemplated, does not give a municipality power to regulate and control the construction of street railways therein. *Raynolds v. Cleveland*, supra, note 12. *People v. Wilson*, 62 Hun, 618, 16 N. Y. Supp. 583; *Burr v. New Castle*, 49 Ind. 322.

¹⁵ *City of Hannibal v. Railroad Co.*, 49 Mo. 480.

¹⁶ *Shelton v. Mobile*, 80 Ala. 540, 68 Am. Dec. 143; *White v. Kent*, 11 Ohio St. 550.

¹⁷ *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Spokane St. Ry. Co. v. Spokane*, 5 Wash. 634, 32 Pac. 456; *North Pacific Lumber & Mfg. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4.

¹⁸ *West v. Blake*, 4 Blackf. (Ind.) 234; *Kerrigan v. West Hoboken*, 37 N. J. Law, 77.

¹⁹ *Protzman v. Railroad Co.*, 9 Ind. 467, 68 Am. Dec. 650; *CITY OF CLINTON v. RAILROAD CO.*, 24 Iowa, 455; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *City of Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252; *City of Houston v. Railway Co. (Tex.)* 35 S. W. 74.

²⁰ 2 Dill. Mun. Corp. § 656.

²¹ *City of Norwich v. Story*, 25 Conn. 44; *Town of Bennington v. Smith*, 29 Vt. 254; *Wells v. McLaughlin*, 17 Ohio, 99; *Baldwin v. Green*, 10 Mo. 410.

takable language.²² The judicial inclination also generally favors such construction of charters and general law as will vest the municipality with the control of its own streets.

DEDICATION AND ACCEPTANCE.

130. Dedication of property for street uses may be made by any legal or equitable owner, either in writing or orally, or by conduct, or acquiescence in public user, such as will suffice to estop claim to the contrary.

A dedication at common law is the appropriation and setting apart of private property to the use of the public.²³ It consists of both act and intention, and may be either express or implied; ²⁴ express when the owner, either in writing or by parol, declares his intention to donate and surrender the property to the use of the public; ²⁵ implied as when this intention is signified by a public platting of property and lots with open spaces apparently for street uses,²⁶ or when the public for a long time uses the property for a street with the knowledge of the owner, and without his objection.²⁷ Slight circumstances of assent do not suffice to constitute a dedication, nor long user without the owner's knowledge; ²⁸ but, when the public

²² *City of Indianapolis v. Croas*, 7 Ind. 9; *State v. Jones*, 18 Tex. 874; *Cross v. Morristown*, 18 N. J. Eq. 305.

²³ *Black, Law Dict.*, in verb.

²⁴ *Ellsworth v. Lord*, 40 Minn. 337, 42 N. W. 389; *Village of Princeville v. Auten*, 77 Ill. 325; *McKee v. Perchment*, 69 Pa. 342; *State v. Woodward*, 23 Vt. 92.

²⁵ *Forney v. Calhoun Co.*, 84 Ala. 215, 4 South. 153; *Cook v. Harris*, 61 N. Y. 448; *Smith v. Navasota*, 72 Tex. 422, 10 S. W. 414; *Village of Winnetka v. Prouty*, 107 Ill. 218; *City of Shreveport v. Drouin*, 41 La. Ann. 867, 6 South. 656; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130.

²⁶ *Darker v. Beck*, 56 Hun, 650, 11 N. Y. Supp. 94; *Waugh v. Leech*, 28 Ill. 488; *Waltman v. Rund*, 109 Ind. 366, 10 N. E. 117; *Arrow-Smith v. New Orleans*, 24 La. Ann. 194.

²⁷ *McKenna v. Boston*, 131 Mass. 143; *Faust v. Huntington*, 91 Ind. 493; *Hoole v. Attorney General*, 22 Ala. 190.

²⁸ *Gerberling v. Wunnenberg*, 51 Iowa, 125, 49 N. W. 861; *McKey*

use has been continuous and notorious for a long time, knowledge and assent may both be presumed.²⁰

Who May Dedicate—Common-law Dedication.

Dedication may be made not only by a legal owner,²⁰ but also by the owner of the equitable interest,²¹ or by a married woman,²² but not by her husband.²³ The common-law dedication does not pass the title, but only a public easement,²⁴ the title still remaining in the owner, who, upon abandonment of the easement, may resume possession. A dedication for

v. Hyde Park, 37 Fed. 389; *People v. O'Keefe*, 79 Cal. 171, 21 Pac. 539.

²⁰ *Smith v. Inge*, 80 Ala. 283; *Shea v. Ottumwa*, 67 Iowa, 39, 24 N. W. 582; *City of Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452.

²⁰ *Lawe v. Kaukauna*, 70 Wis. 306, 35 N. W. 561; *Forney v. Calhoun Co.*, 84 Ala. 215, 4 South. 153; *Town of Edenville v. Railway Co.*, 77 Iowa, 69, 41 N. W. 568.

²¹ *City of Hannibal v. Draper*, 15 Mo. 638; *Johnstone v. Scott*, 11 Mich. 232; *Williams v. Society*, 1 Ohio St. 478.

²² *Todd v. Railroad Co.*, 19 Ohio St. 514; *Schenley v. Commonwealth*, 36 Pa. 29, 78 Am. Dec. 359.

²³ *City of Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. 551; *City of Marshall v. Anderson*, 78 Mo. 85.

²⁴ *City of New Orleans v. U. S.*, 10 Pet. (U. S.) 662, 9 L. Ed. 573; *McConnell v. Lexington*, 12 Wheat. (U. S.) 582, 6 L. Ed. 735; *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75); *Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720; *Stevenson v. Chattanooga*, 20 Fed. 586; *City of Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Bliss v. Ball*, 99 Mass. 597; *Brakken v. Railway Co.*, 29 Minn. 41, 11 N. W. 124; *Baker v. St. Louis*, 75 Mo. 671.

Where the city owns the land included within a street, the subsequent narrowing of such street does not give title to the abutting owner of the narrow strip of land. *Watson v. New York*, 67 App. Div. 573, 73 N. Y. Supp. 1027.

Under a common-law dedication, where a street is vacated by a city, the vacated portion reverts to the abutting owners, subject to such rights as other abutting property owners on the street may have therein. *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600.

street uses does not authorize the appropriation or conversion of the same to any other use, public or private.³⁵

Acceptance.

A common-law dedication for street uses is only consummated by an acceptance thereof by the municipality.³⁶ Acceptance can be made only by a duly authorized municipal agency; but acceptance, like dedication, may be either express or implied.³⁷ Implication of acceptance, however, is not to be made from mere public user; but it may be implied from municipal appropriation for the street, or work done upon it under municipal authority.³⁸ The matter of acceptance becomes important sometimes from the municipal duty to care for and repair the public streets.³⁹ When, however, the dedication is

³⁵ *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 286; *City of New Orleans v. Leverich*, 13 La. 332; *Warren v. Lyons City*, 22 Iowa, 351.

A city cannot authorize a private corporation to construct a railway track for its use on a public street. *Schwede v. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Helneck v. Grosse*, 99 Ill. App. 441.

³⁶ *Village of Winnetka v. Prouty*, 107 Ill. 218; *City of San Francisco v. Canavan*, 42 Cal. 541; *Holdane v. Cold Spring*, 21 N. Y. 474.

³⁷ *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; *Guthrie v. New Haven*, 31 Conn. 308.

³⁸ *Steel v. Borough of Huntington*, 191 Pa. 627, 43 Atl. 398; *Bra-bon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *In re Hunter*, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616; *Morrison v. Conshohocken*, 17 Montg. Co. Law Rep'r (Pa.) 47; *Folsom v. Underhill*, 36 Vt. 580; *Parsons v. University*, 44 Ga. 529; *Kennedy v. Cumberland*, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309; *Shartle v. Minneapolis*, 17 Minn. 308 (Gil. 284).

The existence of a highway must be proved either by record, or by immemorial use and repair, or by dedication and acceptance. *Stone v. Langworthy*, 20 R. I. 602, 40 Atl. 832. See *City of Chicago v. Sawyer*, 166 Ill. 290, 46 N. E. 759.

³⁹ *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Wisby v. Bonte*, 19 Ohio St. 238.

A municipal corporation is bound to use ordinary care to keep its streets and sidewalks in a reasonably safe condition for public use. *Town of Norman v. Teel*, 12 Okl. 69, 69 Pac. 791. But the duty

by the state, no act of acceptance is necessary; the same being conclusively presumed, or, rather, authoritatively enjoined upon the municipality.⁴⁰

Statutory Dedication.

Statutory dedication, as its name implies, is such as the general statutes of a state prescribe, and is determined, as to its form and character, by the provisions of the statute. In general, it may be said that its essential points differ from the common-law dedication, in (1) that acceptance is not required; ⁴¹ (2) that it transfers the title of the land to the public.⁴² A donee or grantee need not usually be named, the dedication being to a public use; but, wherever local law may require a trustee for such use, he will be appointed in equity, so that the trust may not fail.⁴³

USE OF STREETS.

131. The primary use for which streets are dedicated is free and unobstructed passage over them; but this use may be modified or temporarily obstructed under municipal authority for other necessary and appropriate municipal purposes, not inconsistent with, nor destructive of, the primary use of public travel.

requiring a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is limited during the time occupied in making repairs and improvements. *City of South Omaha v. Burke* (Neb.) 91 N. W. 562; *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

See *City of Elgin v. Thompson*, 98 Ill. App. 358; *Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363; *Anderson v. Albion*, 64 Neb. 230, 89 N. W. 794; *Bieber v. St. Paul*, 87 Minn. 35, 91 N. W. 20; *Ray v. Colby* (Neb.) 97 N. W. 591.

⁴⁰ *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417.

⁴¹ *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. 275; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *People v. Jones*, 6 Mich. 176.

⁴² *Wood v. Waterworks Co.*, 33 Kan. 590, 7 Pac. 233; *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. 866.

⁴³ *Bryant's Lessee v. McCandless*, 7 Ohio, 135, pt. 2.

The construction of buildings along the street may require a temporary deposit of building material in the street, or the preparation of material or other work of construction therein to the inconvenience of the public; ⁴⁴ but permission for such use may be granted by the municipality ⁴⁵—usually, however, upon bond for the protection of the city against damages from the abuse of the privilege. Such obstructions must be reasonable, and not so long continued as to prove a nuisance.⁴⁶ The municipal license will not protect the licensee from liability for damages to any abutting owner suffering special injury from the obstruction.⁴⁷ And for the protection of the public the city may require that the owner or contractor erecting a building shall build a covered passway over the sidewalk.⁴⁸ Permission may be granted to use the street for moving buildings ⁴⁹ or

⁴⁴ *People v. Mayor*, 59 How. Prac. (N. Y.) 277; *Commonwealth v. Passmore*, 1 Serg. & R. (Pa.) 217; *Raymond v. Keseberg*, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

⁴⁵ *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *McCarthy v. Chicago*, 53 Ill. 38.

⁴⁶ *McCarthy v. Chicago*, supra; *Lund v. Railroad Co.*, 31 Wash. 286, 71 Pac. 1032, 61 L. R. A. 506, 96 Am. St. Rep. 906; *State v. Pratt*, 52 Minn. 131, 53 N. W. 1069; *Commonwealth v. Passmore*, supra; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573.

Any permanent structure on a street for private use is a pre-
 pture and a nuisance. *Hibbard, Spencer, Bartlett & Co. v. Chi-
 cago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621.

⁴⁷ *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32
 Am. Rep. 286. Contra, *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597.
Cf. Salisbury v. Andrews, 128 Mass. 336.

⁴⁸ *Smith v. Exchange*, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504,
 51 Am. St. Rep. 912.

⁴⁹ *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Day v. Green*, 4 Cush. (Mass.) 433.

Where a council grants a permit to move a building through the streets, there is no implied authority to cut or remove branches from trees located between the sidewalk and the curb of the street, though necessary to use the permit. *State v. Pratt*, 52 Minn. 131, 53 N. W. 1039.

for unloading cars,⁵⁰ but such obstruction must be discontinued within the shortest practicable time. And it has been held that the right to abate a street nuisance by proceeding in equity cannot be defeated by a municipal license or laches or estoppel,⁵¹ nor by prescription or statute of limitations.⁵² The municipality, in maintaining the streets, is performing a governmental function which cannot be alienated⁵³ or lost;⁵⁴ and herein applies the maxim, "Nullum tempus occurrit regi."

⁵⁰ *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248.

⁵¹ *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 63.

But where a city sees a landowner taking possession of a part of a street under an apparent claim of right, and, without objection, permits him to go on for years making improvements which the assertion of the public right to the whole street would destroy or impair, it is estopped by its laches to assert such right. *Corey v. Ft. Dodge*, 118 Iowa, 742, 92 N. W. 704. See, also, *Dickerson v. City of Le Roy*, 72 Ill. App. 588.

⁵² *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; *Meyer v. City of Lincoln*, 33 Neb. 566, 50 N. W. 763, 18 L. R. A. 146, 29 Am. St. Rep. 500.

⁵³ *Chicago General Ry. Co. v. Railway Co.*, 62 Ill. App. 502; *Colwell v. Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; *NEW YORK & N. E. R. CO. v. BRISTOL*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87.

A city in Indiana, vested by statute with exclusive authority, jurisdiction, and power over its streets, cannot alienate such power by a grant to a street railway company in perpetuity to build and operate its road through the streets. *Logansport R. Co. v. Logansport*, 114 Fed. 688. See *Florida Cent. & P. R. Co. v. Railroad Co.*, 39 Fla. 306, 22 South. 692; *Hibbard, Spencer, Bartlett & Co. v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621.

⁵⁴ *Atlantic City v. Snee*, 68 N. J. Law, 39, 52 Atl. 372; *Blennerhassett v. Forest City*, 117 Iowa, 680, 91 N. W. 1044; *Wakeling v. Cocker*, 23 Pa. Super. Ct. 196; *Sims v. Chattanooga*, 2 Lea (Tenn.) 694; *Burbank v. Fay*, 65 N. Y. 57; *Kopf v. Utter*, 101 Pa. 27.

Authorized Uses.

The municipality may also authorize the use of streets for telegraph, telephone, and electric poles and wires,⁵⁵ street and commercial railways,⁵⁶ and may allow below the surface the laying of gas, water, and sewer mains and pipes, and the construction of subways.⁵⁷ Poles may not be planted and wires strung for electric use in the streets without express consent of the municipality;⁵⁸ and it has been held that the municipality may not grant this privilege unless thereunto expressly authorized.⁵⁹ But the decisions upon this subject are not en-

⁵⁵ *Aurora Electric Light & Power Co. v. McWethy*, 104 Ill. App. 479; *McWethy v. Power Co.*, 202 Ill. 218, 67 N. E. 9; *Village of London Mills v. Telephone Circuit*, 105 Ill. App. 146; *Taylor v. Railway*, 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; *Mutual Union Telegraph Co. v. Chicago*, 16 Fed. 309.

A city cannot revoke its license granted to a telephone company to erect poles on its streets after the company has completed its work in accordance with the conditions of the ordinance granting the permit. *Phillipsburg Electric Lighting, Heating & Power Co. v. Phillipsburg*, 66 N. J. Law, 505, 49 Atl. 445. See *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821; *RUTLAND ELECTRIC LIGHT CO. v. ELECTRIC LIGHT CO.*, 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. Rep. 868. But see *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495.

⁵⁶ *Taylor v. Railway*, *supra*; *HUDSON RIVER TELEPHONE CO. v. RAILWAY CO.*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; *Detroit Citizens' St. Ry. Co. v. Detroit*, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667; *Ruttle v. Covington*, 10 S. W. 644, 10 Ky. Law Rep. 766; *Daly v. Railroad Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286.

⁵⁷ *Rochester & L. O. Water Co. v. Rochester*, 176 N. Y. 36, 68 N. E. 117; *Empire City Subway Co. v. Railroad Co.*, 159 N. Y. 555, 54 N. E. 1092; *City of Quincy v. Bull*, 106 Ill. 337; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *STATE v. COKE CO.*, 18 Ohio St. 262.

⁵⁸ *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Domestic Telephone Co. v. Newark*, 49 N. J. Law, 344, 8 Atl. 128; *Julia Bldg. Ass'n v. Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398.

⁵⁹ *Commonwealth v. Boston*, 97 Mass. 555; *Irwin v. Telephone Co.*, 37 La. Ann. 63; *Dodd v. Traction Co.*, 57 N. J. Law, 482, 31

tirely harmonious;⁶⁰ and, if such electric wires become so numerous as to impair the public safety, the municipality may require that they shall be taken off the streets and placed below the surface.⁶¹

Street Railways.

After some contention, the power of a municipality to authorize the construction of street railways in its streets has been thoroughly established and uniformly recognized; but the city may impose such conditions as the safety of the public or the welfare of the municipality may require,⁶² not only at the time of granting the privilege, but also thereafter in the exercise of the police powers;⁶³ and it has been held that, for a breach of these conditions, franchises may be declared forfeited by the court.⁶⁴ The power of the city to grant a fran-

Atl. 980; *Barhite v. Telephone Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659.

Such privilege, being legislative in its character, is not subject to judicial revision at the suit of an abutting owner on the ground of inexpediency. *Lange v. Railway Co.* (Wis.) 95 N. W. 932.

⁶⁰ *Meyers v. Electric Co.*, 63 N. J. Law, 573, 44 Atl. 713; *Dodd v. Traction Co.*, supra; *East Tennessee Telephone Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 21 Ky. Law Rep. 305; *Julia Bldg. Ass'n v. Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Western Union Telegraph Co. v. New York*, 38 Fed. 552, 3 L. R. A. 449; *City of Geneva v. Telephone Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

⁶¹ *O'Brien v. Erie*, 20 Pa. Co. Ct. R. 337, 7 Pa. Dist. R. 491; *Michigan Telephone Co. v. Charlotte*, 93 Fed. 11; *Chesapeake & P. Telephone Co. v. Mayor*, 98 Md. 689, 44 Atl. 1033; *Western Union Telegraph Co. v. New York*, 38 Fed. 552, 3 L. R. A. 449.

⁶² *Fath v. Railway Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *City of Philadelphia v. Railway Co.*, 143 Pa. 444, 22 Atl. 695; *City of New Orleans v. Railway Co.*, 40 La. Ann. 587, 4 South. 513.

⁶³ *State v. Sloan*, 48 S. C. 21, 25 S. E. 898; *Textor v. Railroad Co.*, 59 Md. 63, 43 Am. Rep. 340; *Pittsburg, Ft. W. & C. Ry. Co. v. Chicago*, 159 Ill. 369, 42 N. E. 781.

⁶⁴ *State v. Railway Co.*, 72 Wis. 612, 40 L. R. A. 487, 1 L. R. A. 771; *Galveston & W. Ry. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33.

chise for the use of its streets to an ordinary railroad without express authority has been doubted;⁶⁶ and it has been held that such right cannot be granted for the private use of individuals.⁶⁶

Surface and Underground Control of Streets.

The municipality has control of its streets below as well as above the surface, and may therefore grant to public service corporations the right to lay pipes and mains and to construct subways for all proper municipal purposes. These may include not only pipes and mains for water, gas, and sewage, in case the city has no public system, but also conduits for electric wires and subways for railroads. And in general, it may be said that the power of the municipality over and under its streets, when exercised for the public use, is plenary.⁶⁷

⁶⁶ STANLEY v. DAVENPORT, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216; Ruttle v. Covington, 10 Ky. Law Rep. 766, 10 S. W. 644; Daly v. Railroad Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; McGann v. People, 194 Ill. 526, 62 N. E. 941.

A municipality, having power over its streets, must exercise it for the general public, and cannot grant a railway company such use of a street as will destroy its public usefulness. Burnes v. St. Joseph, 91 Mo. App. 489.

⁶⁶ People v. Blocki, 203 Ill. 363, 67 N. E. 809; Schwede v. Brewing Co., 29 Wash. 21, 69 Pac. 362; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Glaessner v. Association, 100 Mo. 508, 13 S. W. 707; 3 Elliott, R. R. § 1077. But see Texarkana & Ft. S. R. Co. v. Railroad Co., 28 Tex. Civ. App. 551, 67 S. W. 525. The erection of buildings on a public street is an invasion of the rights of both the public and every owner of land abutting thereon. Northern Pac. Ry. Co. v. Lake, 10 N. D. 541, 88 N. W. 461; Hanbury v. Lumber Co., 98 Ga. 54, 26 S. E. 477.

⁶⁷ City of Richmond v. Smith (Va.) 43 S. E. 345; Budd v. Railroad Co., 63 N. J. Eq. 804, 52 Atl. 1130; Leeds v. Richmond, 102 Ind. 372, 1 N. E. 711; City of Cincinnati v. Penny, 21 Ohio St. 499, 8 Am. Rep. 73; McKevitt v. Hoboken, 45 N. J. Law, 482; Horton v. Mayor, 4 Lea (Tenn.) 39, 40 Am. Rep. 1; Mayor, etc., of City of Americus v. Eldridge, 64 Ga. 524, 37 Am. Rep. 89; Pool v. Trexler, 76 N. C. 297; LOWELL v. BOSTON, 111 Mass. 454, 15 Am. Rep. 39;

Vacation.

Possessing paramount power over streets, the state may vacate them, or authorize their vacation by the municipality. Such power, being discretionary, is rarely supervised or interfered with by the courts; but the vacation must be for public, not private, benefit. The vacation may be total, or partial only, and must be effected in the mode prescribed by law. Abutters have peculiar rights in streets, and always assert the old adage, "Once a highway, always a highway." They may not only stand surely upon "due process of law" for protection, but may also insist upon the constitutional right to compensation for the appropriation of their easement of access to the public use.⁶⁸

Abandonment.

Abandonment of streets has been recognized by some American courts as an informal but sufficient vacation; but, since it cannot be based upon lapse of time or nonuser, the evidence of the municipal conduct must exclude all reasonable doubt as to the fixed purpose to vacate a street.⁶⁹

People v. Nearing, 27 N. Y. 309; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437. As to the use of the surface of the street for hack stands, see *Odell v. Bretney*, 38 Misc. Rep. 603, 78 N. Y. Supp. 67.

⁶⁸ *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *LAHR'S CASE*, 104 N. Y. 268, 10 N. E. 528; *Butterworth v. Bartlett*, 50 Ind. 537; *City of Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452; *Coster v. New York*, 43 N. Y. 399; *Elliott, Roads & S.* p. 664; *James v. Darlington*, 71 Wis. 173, 36 N. W. 835; *Hesling v. Scott*, 107 Ill. 600. But on compensation, see *McGee's Appeal*, 114 Pa. 470, 8 Atl. 237.

⁶⁹ *Warner v. Holyoke*, 112 Mass. 362; *City of Peoria v. Johnston*, 56 Ill. 45; *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *State v. Culver*, 65 Mo. 607, 27 Am. Dec. 295; *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417; *Sanborn v. School Dist.*, 12 Minn. 17 (Gil. 1); *Lathrop v. Railroad Co.*, 69 Iowa, 105, 28 N. W. 465.

ABUTTING OWNERS.

132. An abutting owner shares in all the rights of the general public, and, in addition thereto, has such special rights as arise from his property abutting on the street.

Among these is the right of free and unimpeded ingress and egress to and from his property for himself and animals and goods, even though he may thereby cause temporary inconvenience to the public in general.⁷⁰ The convenient use of property, in urban communities, is dependent upon connections

⁷⁰ *Callanan v. Gilman*, *supra*; *STORY'S CASE*, 90 N. Y. 122, 43 Am. Rep. 146.

Owners of property abutting on an alley have property rights not shared by the general public in the entire alley, and the obstruction of a terminus of the alley by the city, thus preventing egress and ingress from the street, is an actionable private wrong. *Dries v. St. Joseph*, 98 Mo. App. 611, 73 S. W. 723. But the mere fact that an obstruction in a street causes inconvenience in getting from the street in front of his house to a particular part of the city does not constitute such special damage as to entitle the owner to an injunction. *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305.

It has been held that an abutting owner may maintain injunction proceedings to prevent the obstruction of a public street, he having an especial interest therein because the street makes his property a corner lot, and affords him access to the sides and rear thereof. *Longworth v. Sedevic*, 165 Mo. 221, 65 S. W. 260.

See *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515; *City of Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Donahue v. Gas Co.* (Sup.) 85 N. Y. Supp. 478 (shade trees destroyed by escaping gas); *Fence v. Bryant* (W. Va.) 46 S. E. 275; *Village of Winnetka v. Railway Co.*, 107 Ill. App. 117; *Id.*, 204 Ill. 297, 68 N. E. 407; *Young v. Rothrock*, 121 Iowa, 588, 96 N. W. 1105; *Same v. Chadima*, *Id.*; *Montgomery City Council v. Parker*, 114 Ala. 118, 21 South. 452, 62 Am. St. Rep. 95.

An abutting owner may place steps, stepping stones, hitching posts, and awning posts on the highway. *Louth v. Thompson*, 1 Pennewill (Del.) 149, 39 Atl. 1100.

But see *West v. Bancroft*, 32 Vt. 367.

with sewer, water, and gas pipes. For these the owner himself must pay. The property is subject to contribution of its share of the cost of building sidewalks and pavements in front of it.⁷¹ All these are necessary to the enjoyment of his property, and are as much property as is the land itself, and equally within constitutional protection.⁷²

Vaults under Sidewalks.

If the fee of the street is in the abutting owner, it is held that he has right to excavate under the walk,⁷³ subject to municipal regulations, and to use space there for such purposes as do not interfere with full and complete use of the street by the public.⁷⁴ If the fee to the street belongs to the municipality, this right may be conceded to the abutter under like conditions.⁷⁵ Whether his right in such case is equal to that when he owns the fee to the street is not definitely established by the decisions of the courts.⁷⁶ This is true even in New York, where the rights of the abutting owner have been most

⁷¹ 2 Dill. Mun. Corp. § 656a.

⁷² First Nat. Bank v. Tyson, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46; Story v. Railroad Co., 90 N. Y. 122, 43 Am. Dec. 146; LAHR v. RAILWAY CO., 104 N. Y. 268, 10 N. E. 528.

The occupants of a building abutting upon a sidewalk are entitled to have the light and air pass unobstructed across the open space between the surface of the sidewalk and the sky. John Anisfield Co. v. Edward B. Grossman & Co., 98 Ill. App. 180.

See Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441.

⁷³ First Nat. Bank v. Tyson, *supra*; McCarthy v. Syracuse, 46 N. Y. 194; Davis v. Clinton, 50 Iowa, 588; Fisher v. Thirkell, 21 Mich. 1, 4 Am. Dec. 422; Papworth v. Milwaukee, 64 Wis. 389, 25 N. W. 431. See Deshong v. New York, 74 App. Div. 234, 77 N. Y. Supp. 563.

⁷⁴ Heineck v. Grosse, 99 Ill. App. 441; Louth v. Thompson, 1 Pennewill (Del.) 149, 39 Atl. 1100; City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; Gridley v. Bloomington, 68 Ill. 50; Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498.

⁷⁵ Tied. Mun. Corp. § 298.

⁷⁶ Nelson v. Godfrey, 12 Ill. 22; Gridley v. Bloomington, *supra*.

repeatedly and thoroughly litigated.⁷⁷ Whatever the rights of the abutter may be in either instance, they must be held by him subject to the paramount rights of the public, which are not confined to the right of travel, only, but extend to all legitimate street uses, both above and below the surface, which the public welfare may require.⁷⁸

Lateral Support.

An abutting owner has at common law no right to lateral support of street soil,⁷⁹ and none can be acquired by prescription or lapse of time;⁸⁰ and, though the street grade may be changed so that his fences fall, he has no action therefor.⁸¹ Nor can an abutting owner be compelled to repair sidewalks or streets in front of his property in absence of statutory provision, no liability for such repair existing at common law.⁸²

Additional Burdens—Compensation.

If additional burdens are imposed upon a street, abutting owners are entitled to compensation; if damaged; and this notwithstanding the fee is in the public, or the municipality for public use.⁸³ But "there must be an injury to the present use and enjoyment of the land." So it is held that they may re-

⁷⁷ *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498; *McCarthy v. Syracuse*, 46 N. Y. 194; *Deshong v. New York*, 74 App. Div. 234, 77 N. Y. Supp. 563.

⁷⁸ *Allen v. Jersey City*, 53 N. J. Law, 522, 22 Atl. 257; *Louth v. Thompson*, 1 Pennewill (Del.) 149, 39 Atl. 1100.

⁷⁹ *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; *Castleberry v. Atlanta*, 74 Ga. 164; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

⁸⁰ *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669.

⁸¹ *City of Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73.

⁸² *Village of Fulton v. Tucker*, 3 Hun (N. Y.) 529; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358.

⁸³ *Theobald v. Railway Co.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564.

Where a city erects buildings in a street without authority, an abutting property owner injured by the nuisance so caused is entitled to maintain an action against the city to abate the nuisance,

cover damages for the construction of a common traffic railroad,⁸⁴ but not for a mere street railway, whether operated by cable, electric, or horse power.⁸⁵

Balconies, Awnings and Other Projections.

The abutter has no right to project his buildings, or any part thereof or attachment thereto, over the street line, without municipal consent;⁸⁶ but a city may permit abutters to

and recover damages occasioned thereby. *Pettit v. Grand Junction*, 119 Iowa, 352, 98 N. W. 381.

In the erection of telegraph and telephone lines, those exercising the franchise may be compelled to pay damages to the abutting owners. *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414.

⁸⁴ *Ruttle v. Covington*, 10 Ky. Law Rep. 766, 10 S. W. 644; *Perry v. Railroad Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Imlay v. Railroad Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Nicholson v. Railroad Co.*, 22 Conn. 74, 56 Am. Dec. 390; *Cox v. Railroad Co.*, 48 Ind. 178; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 631; *Inhabitants of Springfield v. Railroad Co.*, 4 Cush. (Mass.) 71; *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Southern Pac. R. Co. v. Reed*, 41 Cal. 256.

In *People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304, it was held that a municipality has no power to authorize by ordinance the construction by a private citizen of a projection extending into the street in front of his property for any distance—even the smallest—so as to deprive the public of their right to the use of the street in its entirety.

⁸⁵ *Kennelly v. Jersey City*, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; *Hine v. Railroad Co.*, 42 Iowa, 636; *Stewart v. Railway Co.*, 58 Ill. App. 446; *Merrick v. Railroad Co.*, 118 N. C. 1081, 24 S. E. 667; *Elliott v. Railroad Co.*, 32 Conn. 579; *Hobart v. Railroad Co.*, 27 Wis. 194, 9 Am. Rep. 461; *Citizens' Coach Co. v. Railroad Co.*, 33 N. J. Eq. 267, 36 Am. Rep. 542; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Brown v. Duplessis*, 14 La. Ann. 842; *Hiss v. Railway Co.*, 52 Md. 242, 36 Am. Rep. 371.

⁸⁶ *Young v. Rothrock*, 121 Iowa, 588, 96 N. W. 1105; *Same v. Chadima, Id.*, where an ice chute across a street was held to be a nuisance. See *Broadbelt v. Loew*, 15 App. Div. 343, 44 N. Y. Supp. 159. But where a statute authorizes the construction, the city has no authority to prohibit it. *French v. Brunswick*, 21 Me. 29, 38 Am.

extend balconies, bay windows, awnings, or signs into streets;⁸⁷ and it has been held that in such case an adjoining property owner may not maintain an action for inconvenience suffered by him therefrom.⁸⁸

SEWERS.

133. The construction of sewers is an inherent municipal function for sanitary purposes, and may be imperatively imposed upon a municipality by the state.

The power and duty of the municipality in preserving the public health often require the construction of a sewer system for the use of the citizens, and, in commenting upon the famous Detroit Park Case, Judge Dillon argues that the legislature would have authority to compel the construction of a sewerage system for the benefit of the city.⁸⁹ But whether this is a governmental or municipal power and duty is not clear from the decisions of the courts, some opinions suggesting that,

Dec. 250; *City of Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Hawkins v. Sanders*, 45 Mich. 491, 8 N. W. 98; *Day v. Millford*, 5 Allen (Mass.) 98; *Bohen v. Waseca*, 32 Minn. 176, 19 N. W. 780, 50 Am. Rep. 564; *Jones v. Boston*, 104 Mass. 75, 6 Am. Rep. 194.

⁸⁷ *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; *Ivins v. Trenton*, 68 N. J. Law, 501; 53 Atl. 202; *Id.*, 55 Atl. 1132.

But where a property owner conducted stores on opposite sides of the street, and built a passway over the street connecting the two stores, the ordinance authorizing such construction was held invalid. *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441.

⁸⁸ *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597; *Salisbury v. Andrews*, 128 Mass. 336.

But see *John Anisfield Co. v. Edward B. Grossman & Co.*, 98 Ill. App. 180.

If his means of egress and ingress from and to his property are obstructed, he may maintain a suit against the person erecting the obstruction for its removal. *Bourbon Stockyard Co. v. Woodley*, 25 Ky. Law Rep. 477, 76 S. W. 28.

⁸⁹ 1 Dill. Mun. Corp. § 73.

as a part of the high duty of preserving the public health, it is governmental,⁹⁰ while others indicate that it is municipal, as being for the special benefit of the people of the municipality.⁹¹ Certain is it that the power is an important one, and is universally exercised in all the larger and many of the smaller cities.

Municipal Discretion—Extraterritorial Acquisition.

Unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of sewers, and also the nature and cost of the system.⁹² This function is legislative, and the municipality cannot be held liable for failure to exercise it, and thus provide a system of its own,⁹³ or for mistake made in the choice of the systems offered.⁹⁴ Usually this power is held, as we have heretofore seen,⁹⁵ to be confined to the municipal boundaries; but it is often expressly permitted to the municipality to acquire property outside its limits for obtaining an outlet for its sewerage system, and it has been held that this power to obtain an extraterritorial outlet may be implied from the power to construct such system.⁹⁶

⁹⁰ *Cochrane v. Malden*, 152 Mass. 365, 25 N. E. 620; *Noble v. St. Albans*, 56 Vt. 522; *Springfield v. Spence*, 39 Ohio St. 665; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

⁹¹ *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Ostrander v. Lansing*, 111 Mich. 693, 70 N. W. 332; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78.

⁹² *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342.

⁹³ *MILLS v. BROOKLYN*, 32 N. Y. 489; *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *City Council of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

⁹⁴ *MILLS v. BROOKLYN*, *supra*; *Perry v. Worcester*, 6 Gray (Mass.) 544, 66 Am. Dec. 431; *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409, 3 Am. St. Rep. 70.

⁹⁵ *Ante*, § 53.

⁹⁶ *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

It has been held that a city has inherent authority, unless ex-

Eminent Domain.

The municipality may, of course, use the streets for the construction of a sewerage system, and it has been held that it has also the power of eminent domain over other property for this purpose.⁹⁷ And this is consistent with the idea that the construction of a sewerage system is a governmental function. But in other cases it has been held that the power of eminent domain can be used for this purpose only when expressly granted to the municipality.⁹⁸

Expense of Construction—Connection.

It is competent for the city to assess the expense of building a sewerage system for a certain street against the abutting property,⁹⁹ and to require all persons residing on the street to connect with the sewer;¹⁰⁰ and it has been held that no property owner can be prevented from tapping a municipal sewer.¹⁰¹

pressly forbidden by its charter, to make contracts and construct works beyond the corporate limits for the discharge of sewage, where such discharge is necessary or manifestly desirable. *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

⁹⁷ *Hildreth v. Lowell*, 11 Gray (Mass.) 345.

⁹⁸ *Allen v. Jones*, 47 Ind. 438.

⁹⁹ *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330; *Hungerford v. Hartford*, 39 Conn. 279; *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741; *City of Philadelphia v. Tryon*, 35 Pa. 401; *Wright v. Boston*, 9 Cush. (Mass.) 233; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86; *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479.

¹⁰⁰ *City of Mobile v. Water Supply Co.*, 130 Ala. 379, 30 South. 446.

The requirement for a sewer connection with a dwelling on premises abutting on a sewer in a city is within the power of the local authorities, and this requirement may be anticipated for municipal convenience, and as a necessary police regulation. *Van Wagoner v. Paterson*, 67 N. J. Law, 455, 51 Atl. 922.

¹⁰¹ *Taylor v. Austin*, 32 Minn. 247, 20 N. W. 157; *Buchanan v. Duluth*, 40 Minn. 402, 42 N. W. 204; *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Kranz v. Baltimore*, 64 Md. 491, 2 Atl. 908.

Maintenance.

A sewer being once completed, it is the imperative municipal duty to see that it is properly cared for; and for failure to perform this function the municipality may become liable in damages.¹⁰²

PARKS.

134. Public parks and squares are proper objects of municipal concern, as means for the promotion of public health and comfort; and property may be acquired and held by a municipality for these recognized public purposes.

Public parks, such as Hyde Park and the Bois de Boulogne, and public squares, such as Trafalgar Square and the Place de la Concorde, have long been recognized and maintained as municipal attractions and conveniences for the inhabitants and sojourners of a city. Modern sanitation has proven them to be not only beautiful and attractive, but useful and necessary as active agents in promoting public health, so that not only in Paris, London, and New York, but in lesser cities, whole squares have been acquired from private owners in districts of congested population, buildings demolished, and the ground prepared for trees, grass, flowers, and shrubs, which are grown there not merely for ornamental, but sanitary purposes as well. Recognizing these as an important public use, the states have generally conferred upon municipalities the sovereign power of eminent domain for the purpose of condemning property for the public use in parks and squares, and have often authorized this to be done beyond the limits of the municipal corporation.¹⁰³

¹⁰² *Burnett v. New York*, 36 App. Div. 458, 55 N. Y. Supp. 893. The sewers of a city are its private property, and the general public of the state at large have no interest in them. *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; *City of Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961.

¹⁰³ *Higginson v. Nahant*, 11 Allen (Mass.) 530; *Mayor v. Commis-*

Municipal not Governmental Concern.

But though parks and squares are recognized as of public use, they are matters of municipal rather than governmental concern. They interest the people of the city rather than the general public. It has therefore been held that the establishment of parks and squares is within the discretion of the municipality.¹⁰⁴ These cases are not easily reconciled with those which hold that a city may be compelled to construct drains and sewers, which are likewise means for the promotion of municipal health. Various states, however, according to local conditions, very naturally hold different doctrines upon this subject;¹⁰⁵ and the rulings in the manufacturing states of Connecticut and Rhode Island would not probably be in accord with the decisions in agricultural states like Iowa, Mississippi, and Texas. In the celebrated Detroit Park Case, the Supreme Court of Michigan ruled that the state could not compel the city of Detroit to expend money for the purchase and improvement of land for a municipal park, Judge Cooley declaring that "it is a fundamental principle in this state, recognized and perpetuated by express provision of the Constitution, that the people of every hamlet, town, and city of the state are entitled to the benefit of local self-government."¹⁰⁶ The right of home rule is not so strenuously asserted in all the states,¹⁰⁷ and it cannot be doubted that in some of them, if the municipality should fail to make proper provision for parks necessary for the health of the people residing in the densely settled districts, the Supreme Court would sustain a legislative act compelling a city, in the interest of the public health, to

sloners, 44 Mich. 602, 7 N. W. 180; In re Mayor, etc., of New York, 99 N. Y. 569, 2 N. E. 642; Mills, Em. Dom. §§ 49, 50.

¹⁰⁴ PEOPLE v. DETROIT, 28 Mich. 228, 15 Am. Rep. 202.

¹⁰⁵ David v. Water Committee, 14 Or. 98, 12 Pac. 174; People v. Mayor, 29 Mich. 347; People v. Chicago, 51 Ill. 17, 2 Am. Rep. 278.

¹⁰⁶ PEOPLE v. DETROIT, *supra*.

¹⁰⁷ PERKINS v. SLACK, 86 Pa. 283; DARLINGTON v. MAYOR, 31 N. Y. 164, 88 Am. Dec. 248.

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acquire property for public parks, for the sanitation of this congested population.

Cannot be Converted to Private Use.

It is obvious that the city may accept land dedicated for public parks and squares, and appropriate money out of the municipal treasury for its improvement. If, by the terms of the dedication, the property is expressly appropriated to these particular uses, the city may not alienate it or convert it to any other purpose, either public or private;¹⁰⁸ but, if an absolute fee is given to the municipality, its power over the property is unlimited for municipal purposes.¹⁰⁹ It has accordingly been held that a city cannot authorize the erection of any private building upon a public square or park—even a railway station or depot¹¹⁰—and that a lease of the park for private use is void.¹¹¹ Whether a city may use portions of a park for

¹⁰⁸ *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 266; *City of Jacksonville v. Railway Co.*, 67 Ill. 540; *Price v. Thompson*, 48 Mo. 363; *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185.

¹⁰⁹ *Capdevielle v. Railroad Co.*, 110 La. 904, 34 South. 868; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Van Ness v. Washington*, 4 Pet. (U. S.) 232, 7 L. Ed. 842.

¹¹⁰ *Mayor, etc., of City of Columbus v. Jaques*, 30 Ga. 506; *State v. Atkinson*, 24 Vt. 448; *Archer v. Salinas*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *Northern Pac. Ry. Co. v. Lake*, 10 N. D. 541, 88 N. W. 461.

In Boston the construction of the subway necessitated the erection of railway stations on Boston Common, and, in order that this might be done (it being prohibited by statute), a statute was passed authorizing this use of the public property. *PRINCE v. CROCKER*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

¹¹¹ *Mayor, etc., of City of Macon v. Huff*, 60 Ga. 221; *Reichard v. Fllnn*, 20 Pa. Co. Ct. R. 129.

An agreement made by a park commissioner, giving an individual the exclusive privilege of renting chairs in the public parks of a city, under which chairs were substituted for park benches located under the trees, compelling the public to hire chairs, or sit in the sun, is illegal, as being in derogation of public rights. *Kurtz v.*

public streets seems to be unsettled, some of the cases favoring¹¹² and others opposing¹¹³ that power. The cases may probably be reconciled upon the distinction that ways may be opened through a park for pleasure driving and riding, like Rotten Row in Hyde Park, but they may not be used for traffic purposes.

Monuments and Fountains.

The city has control of the parks and squares, and may permit and provide for, or refuse, in its discretion, the erection of monuments, fountains, art galleries, and zoological buildings,¹¹⁴ and may pass ordinances for the protection of animals and birds therein, whether confined or allowed to roam and range.

Withdrawal of Dedication.

It is a general principle, as we have heretofore seen,¹¹⁵ that, until acceptance, a common-law dedication may be withdrawn; and a dedicator may withdraw his dedication for municipal purposes at any time before the municipality expends money

Clausen, 38 Misc. Rep. 105, 77 N. Y. Supp. 97. But see *Huff v. Macon*, 117 Ga. 428, 43 S. E. 708.

¹¹² *Brobine v. Revere*, 182 Mass. 598, 66 N. E. 607.

The trustees of a village have a right to inclose a public square so that teams and wagons cannot pass across it. *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305.

¹¹³ *Bolster v. Railroad Co.*, 79 App. Div. 239, 79 N. Y. Supp. 597; *Seward v. Orange*, 59 N. J. Law, 331, 35 Atl. 799.

¹¹⁴ As to erection of a public building, see *Fessler v. Union* (N. J. Ch.) 56 Atl. 272.

¹¹⁵ Ante, § 130. See *Ayres v. Railroad Co.*, 52 N. J. Law, 405, 20 Atl. 54; *People v. Kingman*, 24 N. Y. 559; *Forsyth v. Dunnagan*, 94 Cal. 438, 29 Pac. 770.

But a license conferred by a city, permitting another to erect a wall in the street, which, after erection, became a part of the street, did not confer on the licensee any property rights in the street, so as to preclude the city from revoking such license, and requiring the removal of the wall without compensation to such licensee. *South Highland Land & Improvement Co. v. Kansas City*, 100 Mo. App. 518, 75 S. W. 383.

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upon the property on the faith of the dedication.¹¹⁶ But he may not revoke a dedication after the city has made substantial expenditure in pursuance of the object of the dedication.¹¹⁷

PUBLIC BUILDINGS.

135. Public buildings are essential for municipal purposes, and the power to acquire land therefor, and erect and maintain necessary buildings thereon, is inherent in the municipal corporation.

What may be the necessary buildings for any municipality, or whether any particular building may be appropriate for municipal uses, is largely a matter of fact, dependent upon peculiar municipal conditions; but it is generally conceded that the city council possesses inherent power to provide appropriate room for its own meeting, and for the transaction of the necessary municipal business.¹¹⁸ It is also obvious that it must provide a proper place for the detention of municipal prisoners,¹¹⁹ and also the proper housing and protection of its fire apparatus; and it has been held, also, that a city school building may be erected without express charter authority.¹²⁰ And in general it may be said that the municipality has implied

¹¹⁶ *City of San Francisco v. Canavan*, 42 Cal. 541; *Logan v. Rose*, 88 Cal. 263, 26 Pac. 106; *Tillman v. People*, 12 Mich. 401; *Schmitz v. Germantown*, 31 Ill. App. 284; *Hanson v. Eastman*, 21 Minn. 509; *Perry v. Railroad Co.*, 55 Ala. 413, 28 Am. Rep. 740.

¹¹⁷ *Crocket v. Boston*, 5 Cush. (Mass.) 182.

The dedicator and the city may jointly arrange to revoke a dedication after acceptance, in case the rights of third persons have not vested by reason of the purchase of lots fronting on the property dedicated. *Municipality No. 3 v. Cotton Press Co.*, 7 La. Ann. 270.

¹¹⁸ *People v. Harris*, 4 Cal. 9; *Reynolds v. Albany*, 8 Barb. (N. Y.) 597; *Vanover v. Davis*, 27 Ga. 357; *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

¹¹⁹ *Long v. Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363; *Felts v. Memphis*, 2 Head (Tenn.) 650; *Davis v. Knoxville*, 90 Tenn. 599, 18 S. W. 254.

¹²⁰ *Mayor, etc., of City of Cartersville v. Baker*, 73 Ga. 686.

power to erect and maintain any public building which is necessary for the performance of its public functions, though it has been declared that it has no right to incur a debt for such purpose.¹²¹ Usually, however, charter power to acquire necessary land and erect necessary buildings for municipal purposes is expressly conferred, under which these functions are clearly in the municipal discretion.

Implied Power to Furnish and Maintain.

Power to erect and maintain such buildings implies also the power to properly furnish, repair, and otherwise care for them, all of which are likewise within municipal discretion; and this discretion has been held to be absolute in the matter of furnishing and decorating the council room, and an injunction accordingly refused to prevent the council from purchasing and hanging portraits of city fathers upon the walls of the council chamber.¹²² Appropriations for municipal buildings and their furnishing have been also contested on the ground of extravagance and public inutility; and it has been held that, if the obvious primary object is to serve some private purpose, the expenditure will be enjoined,¹²³ even though the public might gain some incidental benefit. But the courts have generally recognized the legislative discretion to determine whether a building is needed,¹²⁴ and what expense the city may properly incur therefor, and have therefore refused to enjoin appropriations for buildings provided for prospective wants, or otherwise, in which the amount of the expenditure seemed unwise to the court and jury, when it was being made for a necessary municipal purpose.¹²⁵

¹²¹ *People v. Harris*, 4 Cal. 9.

¹²² *Reynolds v. Albany*, 8 Barb. (N. Y.) 597.

¹²³ *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

¹²⁴ *City of Galveston v. Devlin*, 84 Tex. 319, 19 S. W. 395; *Ely v. Rochester*, 26 Barb. (N. Y.) 133.

¹²⁵ *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep.

Municipal Discretion in Erection.

The power of the state to compel the erection of public buildings has been much mooted, and the general tendency of the decisions is to leave such things to the municipal discretion. It has accordingly been held that the city, being the county seat, may be authorized to levy taxes for the erection of county buildings.¹²⁶ But in the matter of the magnificent city building of Philadelphia, involving the expenditure of millions of dollars, it was held competent for the legislature to empower the construction by commissioners "of all public buildings required to accommodate the courts for all the municipal purposes within the city," and to call on the city annually for a sum sufficient to meet the annual estimates on the building. The act also required the city to make assessments to meet these annual requisitions, when it had no voice, except in the legislature, in determining the character of the building, or the personnel of the construction committee. This strenuous legislation was upheld by the Supreme Court of Pennsylvania over the protest of the city, and the levies compelled by mandamus, even after the Constitution of 1874,¹²⁷ adopted pending the erection of the city hall, had forbidden the legislature "to interfere with any municipal improvement, money, property or effects * * * or to levy taxes, or perform any municipal function whatever," and provided that "no debt shall be contracted or liability incurred by any municipal commission except in pursuance of appropriations previously made by the municipal government," on the ground that this fundamental law did not interfere with existing commissioners, plans, or contracts.¹²⁸ The ruling in this case has not met with general approval, and has rarely been followed, the tendency of the

715; *Greenbanks v. Boutwell*, 43 Vt. 207; *Greeley v. People*, 60 Ill. 10; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71.

¹²⁶ *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677. But a distinction should be noted between permission and compulsion. *Id.*

¹²⁷ Art. 3, § 20; art. 15, § 2.

¹²⁸ *PERKINS v. SLACK*, 86 Pa. 283.

courts being to hold that municipal buildings are matters of municipal, rather than governmental, concern.¹²⁹

¹²⁹ Callam v. Saginaw, *supra*. STATE v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; PEOPLE v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103; State v. Seavey, 22 Neb. 455, 35 N. W. 228.

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CHAPTER XVI.**TORTS.**

- 136. Civil Liability.
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CIVIL LIABILITY.

- 136. A municipal corporation may be liable to a civil action for a wrong committed or permitted by it causing private injury.**

As we have heretofore seen,¹ a municipal corporation may be imposed upon a community against its wish, and its functions prescribed without the consent of the citizens, and thus made an agency of the state for governmental purposes. It is also obvious that the state is not subject to prosecution, nor to action, save by its own consent; and it has been thought anomalous by some that a compulsory agent of the state should be liable either civilly or criminally for trespass or negligence. But we have also seen² that a municipality is usually created at the request of the community, and that it exists not only for the public welfare, but also for the benefit of its citizens; that it is in certain aspects a distinct person, and a member of society, and as such is subject to the general law which is "prescribed by the supreme power in the state,"³ and which

¹ Ante, § 40.

² Ante, §§ 41 and 56.

³ 1 Bl. Comm. p. 44.

any citizen or person violates at peril. A municipality, being not only a public agency, but also a quasi private individual, is therefore subject to the law; and it is too well settled by repeated adjudication, both in England and America, to admit of question that a municipality for its wrong to the public may be prosecuted, and for its torts against individuals may be sued in civil action for damages like a private corporation.⁴

A municipality, being created by the state and endowed with certain functions for the public welfare, must perform those functions, or suffer indictment for its nonfeasance or misfeasance.⁵ Also, being a member of society, and empowered not only to exercise governmental functions, but also to own property and to deal with other corporations and with natural persons upon terms of equality, the municipality must not only respect the law in its contracts, but also in its noncontract relations with others; and where any one suffers an injury by the neglect of the municipality to discharge any absolute duty such person has an action against the municipality for the redress of the injury.⁶

⁴ *Rex v. Oxfordshire*, 16 East, 223; *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586; *State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *Commonwealth v. Newburyport*, 103 Mass. 129; *Barnes v. Dist. of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Worley v. Columbia*, 88 Mo. 106; *Curran v. Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465; *State v. Shelbyville*, 4 Sneed (Tenn.) 176; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347. But see *State v. Burlington*, 36 Vt. 521.

⁵ *Commonwealth v. Bredin*, 165 Pa. 224, 30 Atl. 921; *Commonwealth v. Lansford*, 14 Pa. Co. Ct. R. 376; *State v. Shelbyville*, *supra*; *Commonwealth v. Hopkinsville*, 7 B. Mon. (Ky.) 38.

⁶ *Kleopfert v. Minneapolis* (Minn.) 95 N. W. 908; *Rowland v. Kalamazoo*, 49 Mich. 553, 14 N. W. 494; *Pennoyer v. Saginaw*, 8 Mich. 534; *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185; *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308.

In *Nebraska* the liability of a city for injuries caused is exclusively statutory. *Goddard v. Lincoln*, 96 N. W. 273.

GOVERNMENTAL DUTY—NO ACTION FOR FAILURE IN.

137. No action lies at common law against a municipal corporation for an injury resulting from the performance or nonperformance by it of a purely governmental duty.

The double nature of the municipal corporation, seen in its purely public and governmental functions on the one side and in its municipal and quasi private functions on the other, calls for the application of different rules of law as to the effect of its corporate acts upon natural persons and other corporations. In its purely governmental character a municipality closely resembles a quasi corporation, and in this aspect the law for it is practically the same as for a quasi corporation as to the reason and extent of its exemption from liability for injuries suffered by others.⁷ It is performing a public function—discharging a governmental duty of the state for the public welfare; and out of this no action can arise unless given by statute.⁸ The line separating governmental from municipal duties cannot always be plainly seen; but there are certain functions performed by municipal corporations which are confessedly public, out of which no private action can arise, not only because the state is sovereign and the municipality its agent.⁹

⁷ *Rose v. Toledo*, 24 Ohio Cir. Ct. R. 540; *Bailey v. Mayor*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *City of Helena v. Thompson*, 29 Ark. 569; *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705.

⁸ *Hickox v. Cleveland*, 8 Ohio, 543, 32 Am. Dec. 730; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *City of Richmond v. Long's Adm'rs*, 17 Grat. (Va.) 375, 94 Am. Dec. 461; *Prather v. Lexington*, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585; *Danaher v. Brooklyn*, 51 Hun, 563, 4 N. Y. Supp. 312; *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810.

⁹ *DARGAN v. MOBILE*, 31 Ala. 469, 70 Am. Dec. 508; *Fowle v. Alexandria*, 3 Pet. (U. S.) 398, 7 L. Ed. 719; *City of Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35; *Forsyth v. Atlanta*, 45 Ga. 152, 12 Am. Rep. 576; *Harman v. St. Louis*, 137

but also for the reason that the constant fear of liability for damages while acting for the public welfare would prevent proper performance of these public functions by the corporation.

Public Functions.

Prominent among these governmental functions are: (1) The preservation of the public peace; (2) the preservation of the public health; (3) punishment of criminals; (4) preventing destruction by fire; (5) furnishing public education; (6) providing for the poor. Accordingly, it is held that a city is not liable for negligence or misconduct of its police officers,¹⁰ for they are state officers, rather than municipal; and that it is not

Mo. 494, 38 S. W. 1102; *Beers v. Arkansas*, 20 How. (U. S.) 527, 15 L. Ed. 991.

¹⁰ *City of Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *Betham v. Philadelphia*, 196 Pa. 302, 46 Atl. 448; *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; *Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Calwell v. Boone*, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919; *McAuliffe v. Victor*, 15 Colo. 337, 62 Pac. 231; *Brown's Adm'r v. Guyandotte*, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; *La Clef v. Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; *Corning v. Saginaw*, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *White v. Board*, 129 Ind. 396, 28 N. E. 846; *Davis v. Knoxville*, 90 Tenn. 599, 18 S. W. 254; *Perkins v. New Haven*, 53 Conn. 214, 1 Atl. 825; *Taylor v. Owensboro*, 98 Ky. 271, 32 S. W. 948, 56 Am. St. Rep. 361; *Pollock's Adm'r v. Louisville*, 13 Bush (Ky.) 221, 26 Am. Rep. 260; *Culver v. Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *McElroy v. Albany*, 65 Ga. 387, 38 Am. Rep. 791; *Whitfield v. Paris*, 84 Tex. 431, 19 S. W. 566, 15 L. R. A. 783, 31 Am. St. Rep. 69; *Peck v. Austin*, 22 Tex. 261, 73 Am. Dec. 261; *Kies v. Erie*, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867; *Twyman's Adm'r v. Frankfort (Ky.)* 78 S. W. 446, 64 L. R. A. 292.

Police officers appointed by a city in obedience to a statute are not agents or servants for whose torts the city will be liable under the rule of respondeat superior. *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 1038.

liable for failure to disperse a mob or suppress a riot.¹¹ Nor is a city liable for the misconduct of its health department, or any of its health officers,¹² since sanitation is a public, rather than a municipal, duty. And since the maintenance of public peace and enforcement of good order may require the punishment of evildoers by a municipality, it is the general doctrine that no action will lie against the corporation for the negligence or misconduct of its officers in the confinement or punishment of criminals;¹³ but it has been intimated in North Carolina,¹⁴

¹¹ *Gianfortone v. New Orleans* (C. C.) 61 Fed. 64, 24 L. R. A. 592; *Hart v. Bridgeport*, 13 Blatchf. (U. S.) 289, Fed. Cas. No. 6,149; *Prather v. Lexington*, 18 B. Mon. (Ky.) 559, 56 Am. Dec. 585; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375.

But a state may constitutionally compel its counties and cities to indemnify against loss of property arising from mobs and riots. *Pennsylvania Co. v. Chicago* (C. C.) 81 Fed. 317; *Spring Val. Coal Co. v. Spring Valley*, 65 Ill. App. 571; *Adams v. Salina*, 58 Kan. 246, 48 Pac. 918; *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509; *Underhill v. Manchester*, 45 N. H. 214; *Louisiana v. New Orleans*, 109 U. S. 285, 8 Sup. Ct. 211, 27 L. Ed. 936.

¹² *City of Dalton v. Wilson*, 118 Ga. 100, 44 S. E. 830; *Summers v. Board*, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Whitfield v. Paris*, 84 Tex. 431, 19 S. W. 566, 15 L. R. A. 783, 31 Am. St. Rep. 69.

A city is not liable for the trespass of its mayor, police officers, and city physician in quarantining and detaining a body of yellow fever suspects in a hotel. *City of San Antonio v. White* (Tex. Civ. App.) 57 S. W. 858.

A municipal corporation is not liable for the value of property destroyed by mistake on the order of its health officers. *Lowe v. Conroy* (Wis.) 97 N. W. 942.

¹³ *La Clef v. Concordia*, supra; *Royce v. Salt Lake City*, 15 Utah, 401, 49 Pac. 290; *Nisbet v. Atlanta*, 97 Ga. 650, 25 S. E. 173; *Curran v. Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465; *Gullikson v. McDonald*, supra.

A city, in constructing and maintaining a workhouse, acts in a

¹⁴ *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293; *Coley v. Statesville*, 121 N. C. 801, 28 S. E. 482.

and held in Virginia,¹⁵ that a city or town may be liable for failure to keep its jail or calaboose in proper condition and under the care of competent servants. Though it is not so plainly seen to be for the public welfare, rather than for the benefit of the citizens of the municipality, that fires should be extinguished and private property saved, yet the courts agree that it is a governmental duty to stop conflagrations, and that a municipality cannot be held liable for either the negligence or misconduct of its fire department, or any member thereof;¹⁶ also that a city cannot be held liable for the failure to provide adequate fire apparatus or sufficient water to extinguish fire,¹⁷

governmental, not a municipal, capacity, and is not, therefore, liable for injuries received by a prisoner through the wrongful acts of the workhouse overseer. *Rose v. Toledo*, 24 Ohio Cir. Ct. R. 540.

¹⁵ *Edwards v. Pocahontas* (C. C.) 47 Fed. 268.

In erecting and maintaining a city prison the municipality is exercising a purely governmental function. *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131.

Contra, *Blake v. Pontiac*, 49 Ill. App. 543. See, also, *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; *Eddy v. Ellicottville*, 35 App. Div. 256, 54 N. Y. Supp. 801.

¹⁶ *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Greenwood v. Louisville*, 13 Bush (Ky.) 226, 26 Am. Rep. 263; *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Wilcox v. Chicago*, 107 Ill. 337, 47 Am. Rep. 434; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Burrill v. Augusta*, 78 Me. 118, 8 Atl. 177, 57 Am. Rep. 788; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228.

While driving along the street a horse was frightened by an employé of the fire department and ran away. The city was sued to recover damages, but it was held that there could be no recovery, as the employés of the fire department were public officers engaged in a public duty. *Saunders v. Ft. Madison*, 111 Iowa, 102, 82 N. W. 428; *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347; *Dodge v. Granger*, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781, 33 Am. St. Rep. 901.

¹⁷ *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Springfield Fire & Marine Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E.

though a city has been held liable to an engineer for its negligence in putting him to work upon a defective engine.¹⁸ So, also, it is held that no action will lie against a municipality for injury resulting from the negligence or misconduct of any of its agents or employes in connection with its public school buildings;¹⁹ but, notwithstanding the numerous adjudications to this effect, it is plausibly contended that where a city with sufficient funds is charged with proper care of its school property it ought to be liable for failure to provide a safe place for teachers and pupils.²⁰ Whenever a city is charged with the duty of caring for the poor, no private action can be maintained against it for misfeasance or nonfeasance in the performance of this function;²¹ it is a public charity, governmental in its character, and no liability against the city will arise out of this relation.²² It has repeatedly been adjudged

405, 30 L. R. A. 660, 51 Am. St. Rep. 667; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Akin v. Akin*, 78 Ga. 24, 1 S. E. 267; *Heller v. Sedalla*, 53 Mo. 159, 14 Am. Rep. 444; *Wheeler v. Cincinnati*, supra; *Vanhorn v. Des Moines*, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; *Grant v. Erie*, supra; *Foster v. Water Co.*, 3 Lea (Tenn.) 42; *Witheril v. Mosher*, 9 Hun (N. Y.) 412.

The power resting in a municipality to provide for a supply of water is, in its nature, legislative and governmental, and, if not exercised, and in consequence loss results to property owners by fires, the municipality is not liable for damages. *Planters' Oil Mill v. Light Co.*, 52 La. Ann. 1243, 27 South. 684. See *Springfield Fire & Marine Ins. Co. v. Keeseville*, 6 Misc. Rep. 233, 26 N. Y. Supp. 1094. But see *Springfield Fire & Marine Ins. Co. v. Keeseville*, 80 Hun, 162, 29 N. Y. Supp. 1130.

¹⁸ *City of Lafayette v. Allen*, 81 Ind. 166.

¹⁹ *HILL v. BOSTON*, 122 Mass. 344, 23 Am. Rep. 332; *Howard v. Worcester*, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160, 25 Am. St. Rep. 651. Contra, *McCaughy v. Tripp*, 12 R. I. 449.

²⁰ *Briegel v. Philadelphia*, 135 Pa. 451, 19 Atl. 1038, 20 Am. St. Rep. 885.

²¹ *Neff v. Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500; *Maxmillan v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 469; *Curran v. Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465.

²² *Maxmillan v. New York*, supra; *Benton v. Boston City Hospi-*

also that no private action will lie against the city either for failure to enforce its own laws and ordinances,²³ or from its action or nonaction in any other matter resting in the discretion of the corporation as a governmental agency;²⁴ and so damages have been refused for injuries resulting from forbidden fireworks,²⁵ from a public nuisance,²⁶ for failure to build sewers or drains,²⁷ from the adoption of a defective plan of

tal, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; *City of Richmond v. Long's Adm'rs*, 17 Grat. (Va.) 375, 94 Am. Dec. 461.

²³ *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *Miller & Meyers v. City of Newport News*, 101 Va. 432, 44 S. E. 712; *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; *Moran v. Car Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102; *Levy v. New York*, 1 Sandf. (N. Y.) 465; *Fowle v. Alexandria*, 3 Pet. (U. S.) 398, 7 L. Ed. 719; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Ball v. Woodbine*, 61 Iowa, 83, 15 N. W. 846, 47 Am. Rep. 805.

²⁴ *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105; *Mills v. Brooklyn*, 32 N. Y. 489; *Smith v. Selinsgrove*, 199 Pa. 615, 49 Atl. 213.

²⁵ *McDade v. Chester*, 117 Pa. 414, 12 Atl. 421, 2 Am. St. Rep. 681.

A city is not liable for injuries caused by a discharge of fireworks because the city authorities suspended, for the day of the accident, an ordinance forbidding the discharge of fireworks. *Fifield v. Phoenix* (Ariz.) 36 Pac. 916, 24 L. R. A. 430. But see *Speir v. Brooklyn*, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664, where the city was held liable. See, also, *Landau v. New York*, 90 App. Div. 50, 85 N. Y. Supp. 616.

²⁶ *McCrowell v. Bristol*, 5 Lea (Tenn.) 685; *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598.

A city is not liable for permitting a nuisance to exist on private property within its limits. *Board of Councilmen of Frankfort v. Commonwealth*, 25 Ky. Law Rep. 311, 75 S. W. 217. See *City of Dalton v. Wilson*, 118 Ga. 100, 44 S. E. 830; *Wood v. Hinton*, 47 W. Va. 645, 35 S. E. 824; *Hill v. New York*, 139 N. Y. 495, 34 N. E. 1090; *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504.

²⁷ *Horton v. Nashville*, 4 Lea (Tenn.) 47, 40 Am. Rep. 1; *Wakefield v. Newell*, *supra*.

sewerage,²⁸ and from doing or failing to do any act not ministerial, but legislative or judicial, in its character.²⁹ This exemption from liability is based, like the former one, upon the idea that the decision of this question is the performance of a governmental function.

Statutory Liability.

Action may be given by statute for injuries resulting from any of the foregoing causes, and for some of them the right exists at present in some of the states. The measure and extent of this right can be determined only by consulting the state statutes. But exemption from private action does not imply exemption from public prosecution, as municipal corporations are generally regarded as indictable for misfeasance and nonfeasance of public functions obviously enjoined for the public welfare,³⁰ as we shall see hereafter.

MUNICIPAL DUTY—LIABILITY FOR FAILURE IN.

136. A municipality, in the exercise of its purely municipal functions, is subject to the same rules of liability for torts as a private corporation.

It is in the field of torts that the dual nature of the municipal corporation becomes most conspicuous. In one aspect, as we have seen in the last section, the municipality confessedly occupies the attitude of a sovereign, and enjoys sovereign ex-

²⁸ *Child v. Boston*, 4 Allen (Mass.) 41, 81 Am. Dec. 680; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; *Mills v. Brooklyn*, 32 N. Y. 489.

²⁹ *City of Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Terry v. Richmond*, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834; *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

³⁰ 1 McClain, Cr. Law, § 183; *McCrowell v. Bristol*, *supra*, note 26; *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *Town of Chattanooga v. State*, 5 Sneed (Tenn.) 578; *State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *EASTMAN v. MEREDITH*, 36 N. H. 284, 72 Am. Dec. 302; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470.

emption from liability for injuries resulting from its acts and omissions. The courts also concur in deciding that in its other aspect as a corporation exercising solely municipal functions it is subject to the same rules of liability for torts as a private corporation.³¹ These rules are thus stated by Mr. Clark: "A private corporation is liable for the torts of its servants and agents committed in the course of their employment to the same extent as a natural person would be. And it may be liable for wrongs involving a mental element—as malicious wrongs, frauds, etc.; but it cannot commit a tort like slander, which, from its nature, cannot be committed by deputy."³² This rule of liability prevails against a municipal corporation in regard to those duties which arise from the grant of a special power to be used for quasi private purposes,³³ in the exercise of which the municipality is a corporate person, a member of society, and not a governmental agency.

Municipal Property and Business.

In an early New York case,³⁴ which has been quoted with approval both in England and America, the doctrine of liability of a municipality in regard to its quasi private real property was thus stated: "The citizen and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality. Neither is the privileged owner, and each

³¹ BAILEY v. MAYOR, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Meares v. Commissioners, 31 N. C. 73, 49 Am. Dec. 412; City of Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; 2 Thomp. Neg. p. 738.

³² Clark, Priv. Corp. § 69. See Howland v. Maynard, 159 Mass. 434, 34 N. E. 515, 21 L. R. A. 500, 38 Am. St. Rep. 445.

³³ Hunt v. Boston, 183 Mass. 303, 67 N. E. 244; Wood, Mast. & Serv. § 463. See, also, BAILEY v. MAYOR, *supra*; Baumgard v. Mayor, 9 La. 119, 29 Am. Dec. 437; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299; Thayer v. Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Mitchell v. Rockland, 41 Me. 363, 66 Am. Dec. 252.

³⁴ BAILEY v. MAYOR, *supra*.

must fulfill the same duties in respect to the other." This rule has been applied to a poor farm³⁵ kept by a municipality, and also to a city cemetery³⁶ yielding profit to the municipality. The same rule has also been applied to a municipality owning or controlling wharves, docks, and piers.³⁷ This rule applies also where the city supplies water³⁸ or light³⁹ for compensation, and so where it maintains a public market.⁴⁰ In a leading New York case⁴¹ Chief Justice Nelson, speaking of the municipal power to construct and maintain waterworks for municipal use, declared: "If the grant is for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom

³⁵ *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308. But see *Maxmillan v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468; *Neff v. Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

³⁶ *City of Toledo v. Cone*, 41 Ohio St. 149.

³⁷ *Seaman v. New York*, 80 N. Y. 239, 36 Am. Rep. 612; *City of Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *City of Jeffersonville v. Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495; *City of Petersburg v. Applegarth's Adm'r*, 28 Grat. (Va.) 321, 26 Am. Rep. 357; *City of Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133; *Manhattan Transp. Co. v. Mayor (D. C.)* 37 Fed. 160; *Smith v. Havemeyer (C. C.)* 36 Fed. 927; *Barber v. Abendroth*, 102 N. Y. 406, 7 N. E. 417, 55 Am. Rep. 821; *Augusta City Council v. Hudson*, 88 Ga. 590, 15 S. E. 678; *Id.*, 94 Ga. 135, 21 S. E. 289 (as to toll bridge); *Whitfield v. Carrollton*, 50 Mo. App. 98; *The Giovanni v. Philadelphia (D. C.)* 59 Fed. 303 (tug boat).

³⁸ *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 386; *City Council of Augusta v. Lombard*, 99 Ga. 282, 25 S. E. 772; *Whitfield v. Carrollton*, 50 Mo. App. 98; *BAILEY v. MAYOR*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

³⁹ *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Bodge v. Philadelphia*, 167 Pa. 492, 31 Atl. 728.

⁴⁰ *City of Savannah v. Collens*, 38 Ga. 334, 95 Am. Dec. 398; *Town of Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640.

⁴¹ *BAILEY v. MAYOR*, 3 Hill, 531, 38 Am. Dec. 669.

the like special franchise had been conferred." And this rule seems to apply to any business undertaken by a municipality under its charter powers.⁴² It is a corporation for profit, and justly subject to the same rules as private corporation.

MUNICIPAL PERFORMANCE OF GOVERNMENTAL DUTY.

139. A municipality, when charged in its corporate character with the performance of a municipal function in regard to governmental affairs, is, by the preponderance of judicial opinion, civilly liable for injuries resulting from misfeasance or nonfeasance of such municipal duty.

Here we enter the disputed boundary of municipal torts. In the field of solely governmental duties the law is plain and well recognized. In the performance of strictly governmental functions the municipality cannot commit a tort. Equally well settled is it that in matters of strictly municipal concern a municipality is subject to the same law as a private corporation. But in the border land between these two open fields, where the dual nature of a municipality appears in both phases, unnumbered contests have occurred over the legal effect of municipal nonfeasance, misfeasance, and even malfeasance, which have been variously decided in America; so that it may well be said that the law on this subject is unsettled; the boundary line of liability is not established.⁴³ The prolific source of contention in this border land has been the municipal control of streets and sewers. The public highways are the special care of the state, inside as well as outside our cities and towns. They are for public use and public convenience, not for local or municipal benefit. Especially is this true of the great thoroughfares of a city or town. Some courts have classified

⁴² 2 Thomp. Neg. p. 738.

⁴³ 2 Dill. Mun. Corp. §§ 961-971; *City of Omaha v. Croft*, 60 Neb. 59, 82 N. W. 120; *McGinnis v. Inhabitants of Medway*, 176 Mass. 67, 57 N. E. 210.

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sewers with streets,⁴⁴ though it is obvious that the municipal interest and benefit far exceeds that of the public in the sewers and drains of the city. Both streets and sewers, however, are usually placed under the special care and control of the municipality. The state delegates this public function to the local corporation, and the bone of contention has been whether the municipality, in caring for streets and sewers, is performing a governmental or municipal function; or, practically stated, the question is whether it may become liable for tort in regard to these governmental affairs.⁴⁵

Liability for Repair of Streets.

The prevailing view of the courts in America is that for a failure to discharge the duty to keep streets in repair there is an implied common-law liability for resulting injury resting upon every chartered municipality.⁴⁶ After long contention in the federal courts this doctrine was at last authoritatively adopted by the Supreme Court of the United States in the leading case of *Barnes v. District of Columbia*; ⁴⁷ and this view is also maintained in the states of Alabama,⁴⁸ Colorado,⁴⁹ the Dakotas,⁵⁰ Delaware,⁵¹ Florida,⁵² Georgia,⁵³ Illinois,⁵⁴ In-

⁴⁴ *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Selfert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464.

⁴⁵ *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472. See *Abendroth v. Greenwich*, 29 Conn. 356.

⁴⁶ 2 Dill. Mun. Corp. §§ 998, 1017, 1018, 1022-1028.

⁴⁷ 91 U. S. 540, 23 L. Ed. 440.

⁴⁸ *Campbell's Adm'r v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656.

⁴⁹ *City of Denver v. Dean*, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594.

⁵⁰ *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414.

⁵¹ *Anderson v. Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509.

⁵² *City of Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358.

⁵³ *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486.

⁵⁴ *City of Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860.

diana,⁵⁵ Iowa,⁵⁶ Kansas,⁵⁷ Kentucky,⁵⁸ Louisiana,⁵⁹ Maryland,⁶⁰ Montana,⁶¹ Minnesota,⁶² Mississippi,⁶³ Missouri,⁶⁴ Nebraska,⁶⁵ Nevada,⁶⁶ North Carolina,⁶⁷ Ohio,⁶⁸ Oregon,⁶⁹ Pennsylvania,⁷⁰ Tennessee,⁷¹ Texas,⁷² Utah,⁷³ Virginia,⁷⁴ Washington,⁷⁵ and West Virginia.⁷⁶ Under the lead of Massachusetts, where this subject has been often and ably considered,⁷⁷ the following states have adopted the contrary view: Arkansas,⁷⁸ California,⁷⁹ Connecticut,⁸⁰ Maine,⁸¹ Michigan,⁸²

⁵⁵ *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

⁵⁶ *Beazan v. Mason City*, 58 Iowa, 233, 12 N. W. 279.

⁵⁷ *Kansas City v. Bermingham*, 45 Kan. 212, 25 Pac. 569.

⁵⁸ *Greenwood v. Louisville*, 13 Bush (Ky.) 226, 26 Am. Rep. 263.

⁵⁹ *Cline v. Railroad Co.*, 41 La. Ann. 1031, 6 South. 851.

⁶⁰ *City of Baltimore v. Marriott*, 9 Md. 160.

⁶¹ *Sullivan v. Helena*, 10 Mont. 134, 25 Pac. 94.

⁶² *Welter v. St. Paul*, 40 Minn. 460, 42 N. W. 392, 12 Am. St. Rep. 752.

⁶³ *Whitfield v. Meridian*, 66 Miss. 570, 6 South. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596.

⁶⁴ *Haniford v. Kansas City*, 103 Mo. 172, 15 S. W. 753.

⁶⁵ *City of Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41.

⁶⁶ *McDonough v. Virginia City*, 6 Nev. 90.

⁶⁷ *Meares v. Wilmington*, 31 N. C. 73, 49 Am. Dec. 412.

⁶⁸ *Village of Shelby v. Clagett*, 46 Ohio St. 549, 20 N. E. 407, 5 L. R. A. 606.

⁶⁹ *Farquar v. Roseburg*, 18 Or. 271, 22 Pac. 1103, 17 Am. St. Rep. 732.

⁷⁰ *Borough of Brookville v. Arthurs*, 130 Pa. 501, 18 Atl. 1076.

⁷¹ *City of Knoxville v. Bell*, 12 Lea, 157.

⁷² *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

⁷³ *Levy v. Salt Lake City*, 3 Utah, 63, 1 Pac. 160.

⁷⁴ *McCoull v. Manchester*, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691; *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76.

⁷⁵ *Hutchinson v. Olympia*, 2 Wash. T. 314, 5 Pac. 606.

⁷⁶ *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512.

⁷⁷ *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Hill v. Boston*, 122 Mass. 344, 23 Am. Dec. 332.

⁷⁸ *Ft. Smith v. York*, 52 Ark. 85, 12 S. W. 157.

⁷⁹ *Arnold v. San Jose*, 81 Cal. 618, 22 Pac. 877.

⁸⁰ *Beardsley v. Hartford*, 50 Conn. 529, 47 Am. Rep. 677.

⁸¹ *Aldrich v. Gorham*, 77 Me. 287.

⁸² *City of Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450. But
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New Hampshire,⁸³ New Jersey,⁸⁴ Rhode Island,⁸⁵ South Carolina,⁸⁶ Vermont,⁸⁷ and Wisconsin.⁸⁸ The Supreme Court of the United States recognizes its duty to follow the decisions of the highest court of each state in regard to municipal liability for tort therein.⁸⁹

REASONABLE CARE OF STREETS.

140. The common law requires every municipal corporation to exercise reasonable care to make and keep its streets safe for all ordinary uses for which they are opened to the public.

A municipality is not an insurer of public safety on its streets. It does not assume to care for and protect the public using its streets under all conditions and emergencies. Dangers may suddenly appear in the streets, of which the city may have no notice. Exigencies may arise with which it is unable to cope, from which the public may suffer injury, but for which the municipality is not liable. It owes the public only the duty of reasonable diligence to keep its streets in such condition that the public, by exercising like diligence, may use them for all lawful purposes with reasonable security. A failure to perform this duty will render a municipality liable for the damage occasioned thereby.⁹⁰

there is in Michigan the duty upon the city to keep its streets in a reasonably safe condition for travel. *Finch v. Bangor* (Mich.) 94 N. W. 738.

⁸³ *Sweeney v. Newport*, 65 N. H. 86, 18 Atl. 86.

⁸⁴ *Wild v. Paterson*, 47 N. J. Law, 406, 1 Atl. 490.

⁸⁵ *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578.

⁸⁶ *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827.

⁸⁷ *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

⁸⁸ *Cairncross v. Pewaukee*, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473.

⁸⁹ *City of Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, and cases cited in notes 47-76, inclusive, *supra*.

⁹⁰ *City of Denver v. Baldasari*, 15 Colo. App. 157, 61 Pac. 190:

Defenses.

For an injury occurring to any person from the apparent neglect of the municipality to keep its streets in repair, two defenses are open, which are generally recognized as sufficient (1) That the city had no notice, actual or implied, of the existing defect. The duty to repair is one of reasonable diligence. Liability cannot be incurred in such case before duty begins; and duty does not precede notice. But actual notice is not required.⁹¹ Having the care of the streets, the municipality

Weightman v. Washington, 1 Black (U. S.) 39, 17 L. Ed. 52; *City of Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Peake v. Superior*, 106 Wis. 403, 82 N. W. 306; *City of Denver v. Moewes*, 15 Colo. App. 28, 69 Pac. 986; *Same v. Dunsmore*, 7 Colo. 329, 3 Pac. 705; *City of Boulder v. Niles*, 9 Colo. 418, 12 Pac. 632; *City of Denver v. Aaron*, 6 Colo. App. 234, 40 Pac. 587; *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453.

While a municipality may authorize erections for public utilities, such as hydrants, in its streets, it still owes to the public the duty to keep its streets in a reasonably safe condition for travelers by day and night; but it is not an insurer of the safety of those using its streets. *Burnes v. St. Joseph*, 91 Mo. App. 489.

It is the duty of the city to keep its streets in reasonably safe condition for all those who rightfully use them, or have occasion to pass over them for the purpose of business, convenience, or pleasure. *Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783.

In the absence of a positive requirement of law that a city keep its streets in a safe or reasonably safe condition, it is bound only to exercise ordinary care to keep them in a reasonably safe condition. *City of Dallas v. Moore* (Tex. Civ. App.) 74 S. W. 95; *Finch v. Bangor* (Mich.) 94 N. W. 738; *Aucoin v. New Orleans*, 105 La. 271, 29 South. 502. And a city cannot claim that its streets are so far public as to free it from responsibility. *Twist v. Rochester*, 165 N. Y. 619, 59 N. E. 1131.

⁹¹ A city is not liable for injuries caused by defective streets in absence of actual notice of such defects, or unless they have existed so long that notice should be imputed to it. *Bell v. Henderson*, 24 Ky. Law Rep. 2434, 74 S. W. 206; *Downs v. Commissioners*, 2 Pennewill (Del.) 132, 45 Atl. 717. See *Jones v. Clinton*, 100 Iowa, 333, 69 N. W. 418; *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475; *Mayor, etc., of City of Montezuma v. Wilson*, 82 Ga. 206, 9 S. E. 17, 14

must use reasonable diligence to know their condition, such as an ordinary man uses in the care of his own property. Notice may, therefore, be implied from the obvious existence of the defect for a sufficient period. What is commonly known by the people in any portion of the city is imputed to the municipality.⁹² (2) The lack of any corporate fund and of any power to obtain one applicable to repairs has also been recognized as a good defense. Such inability in a municipal corporation is rare and exceptional. Want of funds alone is no defense; but lack of power to raise a fund applicable to such purpose was recognized as a just defense to the Men of

Am. St. Rep. 150; *Town of Franklin v. House*, 104 Tenn. 1, 55 S. W. 153; *Ransom v. Belvidere*, 87 Ill. App. 167; *City of Murphysboro v. O'Riley*, 36 Ill. App. 157; *Same v. Baker*, 34 Ill. App. 657.

But a city can only be charged with actual notice of a defect by proof that such notice was given to an officer having authority to act, or whose duty it was to report the matter to some one with authority. *City of Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742.

⁹² *Milledge v. Kansas City*, 100 Mo. App. 490, 74 S. W. 892; *Smith v. Sioux City*, 119 Iowa, 50, 93 N. W. 81; *City of Louisville v. Brewer's Adm'r*, 24 Ky. Law Rep. 1671, 72 S. W. 9; *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *Shipley v. Bolivar*, 42 Mo. App. 491; *McAllister v. Bridgeport*, 72 Conn. 733, 46 Atl. 552; *McDonald v. Ashland*, 78 Wis. 251, 47 N. W. 434; *Tice v. Bay City*, 84 Mich. 461, 47 N. W. 1062; *Bradford v. Anniston*, 92 Ala. 349, 8 South. 683. 25 Am. St. Rep. 60; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; *Mayor, etc., of Birmingham v. Starr*, 112 Ala. 98, 20 South. 424; *Jones v. Greensboro*, 124 N. C. 310, 32 S. E. 675; *Urtel v. Flint*, 122 Mich. 65, 80 N. W. 991; *City of Streator v. Chrisman*, 182 Ill. 215, 54 N. E. 997; *L'Herault v. Minneapolis*, 69 Minn. 261, 72 N. W. 73; *Brell v. Buffalo*, 144 N. Y. 163, 38 N. E. 977; *City of Palestine v. Hassell*, 15 Tex. Civ. App. 519, 40 S. W. 147; *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57; *Rosevere v. Osceola Mills*, 169 Pa. 555, 32 Atl. 548.

Where there is abundant time by reason of reasonably frequent examination to discover and remedy a defective street, and a person is injured in consequence of such defect, the municipality will not be relieved from liability for the consequences of its negligence. *City of Chicago v. McCabe*, 93 Ill. App. 288. See *Corey v. Ann Arbor*, 124 Mich. 134, 82 N. W. 804; *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319.

Devon,⁹³ and has been ever since sustained in English and American courts. It is the chief ground of nonliability of quasi corporations,⁹⁴ and should have equal force and recognition in favor of municipalities not empowered to perform the duty of repair. But there are cases which do not recognize the sufficiency of this defense, and declare it the duty of the corporation to close a dangerous street which it cannot repair.⁹⁵ And the courts which recognize inability as a valid defense require the municipality to show that it has exhausted the means at its command to raise funds for the purpose, and given signals of the danger.⁹⁶

Reasonable Care, What is.

What is reasonable care is a question of fact depending upon the circumstances of each particular case. The degree of repair of a street is a matter of municipal discretion. The standard of repair may well be different in various localities. What is a defect in a fine avenue or great thoroughfare may not be such in an obscure street or alley; and it has even been held that what might constitute actionable negligence on the part of a city as to one person may not be actionable as to another,⁹⁷ which is equivalent to saying that what would be contributory negligence defeating the action of one person

⁹³ Russell v. Men of Devon, 2 Durn. & E. 667.

⁹⁴ Ante, § 9, note 35.

⁹⁵ Elliott, Roads & Sts., pp. 445, 446, 452; Monk v. New Utrecht, 104 N. Y. 552, 11 N. E. 268; Mayor, etc., of City of Birmingham v. Lewis, 92 Ala. 352, 9 South. 243.

⁹⁶ Mayor, etc., of City of Birmingham v. Lewis, supra; Lord v. Mobile (1897) 113 Ala. 360, 21 South. 366; Whitfield v. Meridian, 66 Miss. 570, 6 South. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596; Carney v. Marseilles, 136 Ill. 401, 26 N. E. 401, 29 Am. St. Rep. 328; Moon v. Ionia, 81 Mich. 635, 46 N. W. 25; City of Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Albrittin v. Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Delger v. St. Paul (C. C.) 14 Fed. 567. See Collett v. New York, 51 App. Div. 394, 64 N. Y. Supp. 693, as to faulty construction and warning.

⁹⁷ Municipalities are not bound to the same degree of care on an alley as on its streets. Musick v. Latrobe, 184 Pa. 375, 39 Atl. 226;

might not bar the action of another person of weaker sense and power. Here, as in all cases involving what is reasonable, is a broad boundary of uncertainty between the fixed rules of the law. But it has been held that the municipality must use such care as will protect not only the busy traveler and pedestrian, but also the playing child and even the idle loafer.⁹⁸

OBSTRUCTIONS.

141. Reasonable care of streets also requires of the municipality the removal from them of unlawful obstructions and the signaling of dangerous ones.

As we have hitherto seen, the temporary and partial obstruction of a street may be permitted by the city when necessary for building, removing, improving, or commerce;⁹⁹ but such work must obviously be performed with dispatch and care, and municipal consent must be obtained for the obstruction. Whenever and wherever it is permitted, it is a municipal duty to give reasonable warning to the public, both day and night, of the presence of danger, to the end that it may be avoided.¹⁰⁰ Hitching posts, electric poles, stepping stones,

Gulline v. Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102; *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74.

⁹⁸ *District of Columbia v. Boswell*, 6 App. D. C. 402; *City of Denver v. Murray* (Colo. App.) 70 Pac. 440 (where the city had permitted the erection of a derrick, which fell upon a child who was playing around it); *City of Waverly v. Reesor*, 93 Ill. App. 649; *City of Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528 (where the city of Omaha was held liable for the death of a boy who fell through a section of a sidewalk which he was using as a raft on a pond of water which had accumulated over a street and adjacent private property, because of the city's negligence in constructing a storm sewer). See *City of Chicago v. Keefe* (loafer) 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 608; *Hunt v. Salem*, 121 Mass. 294; *Reed v. Madison*, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

⁹⁹ Ante, §§ 131, 132.

¹⁰⁰ *Leonard v. Boston*, 183 Mass. 68, 66 N. E. 596; *Bauer v. Rochester*, 59 Hun, 616, 12 N. Y. Supp. 418; *City of Canton v. Dewey*, 71 Ill. App. 346; *Lloyd v. Mayor*, 5 N. Y. 369, 55 Am. Dec.

and hydrants are not regarded as unlawful obstructions when placed at the curbstone or margin of the street, so as not to render the way unsafe;¹⁰¹ but such things placed either with or without municipal consent within the portion of the street commonly used either for riding, driving, or walking, and not properly guarded or signaled, will give action against the municipality to one injured thereby.¹⁰² Recoveries against a municipality have also been sustained because of its failure to remove or properly signal as obstructions to the street an ash pile,¹⁰³ motor,¹⁰⁴ steam roller,¹⁰⁵ machinery,¹⁰⁶ a furnace,¹⁰⁷

347; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

¹⁰¹ *City of Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 499; *Weinstein v. Terre Haute*, 147 Ind. 556, 46 N. E. 1004; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Macomber v. Taunton*, 100 Mass. 255.

¹⁰² *Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; *City of Circleville v. Sohn*, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; *City of El Paso v. Dolan* (Tex. Civ. App.) 25 S. W. 669 (glass); *Hayes v. West Bay City*, 91 Mich. 418, 51 N. W. 1067; *Mayor, etc., of City of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243; *Crowther v. Yonkers*, 60 Hun, 586, 15 N. Y. Supp. 538; *South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930; *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844; *Powers v. Insurance Co.*, 91 Mo. App. 55; *Arey v. Newton*, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604; *Ring v. Cohoes*, *supra*; *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745; *City of New York v. Sheffield*, 4 Wall. (U. S.) 189, 18 L. Ed. 416.

¹⁰³ *Kane v. Troy*, 48 Hun, 619, 1 N. Y. Supp. 536; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

¹⁰⁴ *Stanley v. Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

¹⁰⁵ *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407. See *Mulligan v. New Britain*, 69 Conn. 96, 36 Atl. 1005. Contra, where a steam roller frightened a horse it was held that the city was not liable. *Lane v. Lewiston*, 91 Me. 292, 39 Atl. 999.

¹⁰⁶ *Whitney v. Ticonderoga*, 127 N. Y. 40, 27 N. E. 403; *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628.

¹⁰⁷ *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124.

a tent,¹⁰⁸ building material,¹⁰⁹ a hydrant,¹¹⁰ logs,¹¹¹ rocks and stones,¹¹² and also dangerous holes and excavations in or near the street,¹¹³ and objects naturally tending to frighten horses ordinarily gentle.¹¹⁴

¹⁰⁸ *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396.

¹⁰⁹ *Joslyn v. Detroit*, 74 Mich. 459, 42 N. W. 50; *Rommeney v. New York*, 49 App. Div. 64, 63 N. Y. Supp. 186; *Fairgrieve v. Moberly*, 39 Mo. App. 31. See *McDonald v. Troy*, 59 Hun, 618, 13 N. Y. Supp. 385.

¹¹⁰ *Adams v. Oshkosh*, 71 Wis. 49, 36 N. W. 614.

Where no part of the street was appropriated to sidewalks, and vehicles were actually driven on any part of it, the municipality was held liable to a driver who was injured by reason of an unguarded hydrant placed 11 feet from the street line. *Burnes v. St. Joseph*, 91 Mo. App. 489. See *Thunborg v. Pueblo* (Colo. App.) 70 Pac. 148.

¹¹¹ *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721; *Chase v. Lowell*, 151 Mass. 422, 24 N. E. 212.

¹¹² *Koch v. Williamsport*, 195 Pa. 488, 46 Atl. 67; *Patterson v. Austin*, 15 Tex. Civ. App. 201, 39 S. W. 976; *Hesselbach v. St. Louis*, 179 Mo. 505, 78 S. W. 1009.

¹¹³ *Mayor, etc., of City of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243; *Brush v. New York*, 59 App. Div. 12, 69 N. Y. Supp. 51; *Foy v. Winston*, 126 N. C. 381, 35 S. E. 609; *City of South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166.

A city must use reasonable care to protect pedestrians from falling into excavations upon private lots and adjacent to the sidewalk. *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528. See *Oklahoma City v. Meyers*, 4 Okl. 686, 46 Pac. 552; *Hawley v. Atlantic*, 92 Iowa, 172, 60 N. W. 519; *Talty v. Same*, 92 Iowa, 135, 60 N. W. 516; *Brown v. Lousburg*, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677.

¹¹⁴ *City of Weatherford v. Lowery* (Tex. Civ. App.) 47 S. W. 34; *City of Vandalia v. Huss*, 41 Ill. App. 517; *Bowes v. Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Agnew v. Corunna*, 55 Mich. 428, 21 N. W. 873, 54 Am. Rep. 383.

Where a horse of ordinary gentleness merely shies, so that the driver does not lose control of him, but is injured by coming in contact with an obstruction in the street, the city is liable. *Burnes v. St. Joseph*, 91 Mo. App. 489. See *Patterson v. Austin*, *supra*; *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143.

Street Lights.

There is said to be no implied duty resting on a municipality to light its streets;¹¹⁵ but where such duty is imposed by the legislature, or where the city has voluntarily assumed performance of this appropriate municipal function, reasonable care must be exercised to keep the street lamps in good order, and properly lighted; and for failure to do this an action will lie in favor of one receiving special injury therefrom.¹¹⁶

SIDEWALKS.

142. Sidewalks under municipal control are objects of the same reasonable municipal care as other parts of the street, and an action will lie for injuries resulting from nonfeasance or misfeasance of this municipal duty.

It is immaterial whether the municipality has built the sidewalk. Being a part of the street, it is under municipal control, and the corporation will be liable for neglecting to exer-

¹¹⁵ *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5; *City of Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Gaskins v. Atlanta*, 73 Ga. 746.

A municipality need not light its streets, if their construction is reasonably safe for travel, in the absence of statutory command or charter duty. *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096.

Where the charter of a city gives it power to provide for lighting its streets, but does not require it to exercise such power, there is no general duty devolved upon the city to light the streets that will make its failure to do so actionable negligence. *City of Daytona v. Edison (Fla.)* 34 South. 954. See *City of Chicago v. Apel*, 50 Ill. App. 132.

¹¹⁶ *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845; *City of Cleveland v. King*, 132 U. S. 295, 10 Sup. Ct. 90, 33 L. Ed. 334; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Bauer v. Rochester*, 59 Hun, 616, 12 N. Y. Supp. 418.

A city cannot escape liability for injuries caused by the failure of an electric light company which had contracted to light the streets. *City of Baltimore v. Beck*, 96 Md. 183, 53 Atl. 976.

cise ordinary care to keep it reasonably safe.¹¹⁷ The duty is an active one, beginning with the construction of the walk and continuing thenceforth as long as it remains under municipal control.¹¹⁸ If it be the duty of the abutter to make repairs, the municipality is not relieved from liability by notice given to the abutter. The walk must be made safe within a reasonable time, or the municipality will be liable for damages occurring from its being out of repair.¹¹⁹

Reasonable Care—Latent Defects.

The municipality is not an insurer of the safety of its sidewalks.¹²⁰ Its duty is fully performed by the exercise of rea-

¹¹⁷ *City of Beardstown v. Clark*, 104 Ill. App. 568; *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899; *Midway v. Lloyd*, 24 Ky. Law Rep. 2448, 74 S. W. 195; *City of Louisville v. Johnson*, 24 Ky. Law Rep. 685, 69 S. W. 803; *City of Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742; *Same v. Jones* (Tex. Civ. App.) 54 S. W. 606; *City Council of Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389; *City of Evansville v. Frazer*, 24 Ind. App. 628, 56 N. E. 729; *Kellow v. Scranton*, 195 Pa. 134, 45 Atl. 676; *Saulsbury v. Ithaca*, 94 N. Y. 27, 48 Am. Rep. 122; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404; *Barr v. Same*, 105 Mo. 550, 16 S. W. 483; *Fulliam v. Muscatine*, 70 Iowa, 436, 30 N. W. 861; *Graham v. Albert Lea*, 48 Minn. 201, 50 N. W. 1108.

In the absence of a positive requirement of law that a city keep its streets in a safe or reasonably safe condition, it is bound only to exercise ordinary care to keep them in a reasonably safe condition. *City of Dallas v. Moore* (Tex. Civ. App.) 74 S. W. 95; *Brown v. Chillicothe* (Iowa) 98 N. W. 502. But see *Wolf v. District of Columbia*, 21 App. D. C. 464.

¹¹⁸ *Brake v. Kansas City*, 100 Mo. App. 611, 75 S. W. 191; *Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. 584; *Fulliam v. Muscatine*, 70 Iowa, 436, 30 N. W. 861; *Barr v. Kansas City*, *supra*.

¹¹⁹ *Domer v. District of Columbia*, 21 App. D. C. 284; *Michigan City v. Phillips* (Ind. App.) 69 N. E. 700; *Bennett v. Sing Sing*, 60 Hun, 579, 14 N. Y. Supp. 463; *City of Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887; *City of Flora v. Naney*, 31 Ill. App. 493; *Id.*, 136 Ill. 45, 26 N. E. 645; *Kinney v. Tekamah*, 30 Neb. 605, 46 N. W. 835; *Hutchings v. Sullivan*, 90 Me. 131, 37 Atl. 883; *Betz v. Liming*, 46 La. Ann. 1113, 15 South. 385, 46 Am. St. Rep. 344.

¹²⁰ *Burns v. Bradford*, 137 Pa. 361, 20 Atl. 997, 11 L. R. A. 726.

sonable care, not only in construction but also in the inspection of walks. It is not liable for every latent defect, but it may be liable for latent defects which proper inspection would have disclosed. The just rule seems to be that whenever a municipality maintains a sidewalk which it knows, or with due care would know, to be unsafe, it is liable in damages to one suffering injury from the defect.¹²¹

Hatchways and Coal Chutes in Walks.

Hatchways and similar entrances from sidewalks to cellars are necessities in urban life, but the city must take care that such things do not become dangerous to pedestrians.¹²² If basement steps are necessary and permitted in a sidewalk, they must be guarded with suitable railing;¹²³ and the doors or lids of hatchways or coal chutes must be safe and strong, so as to protect pedestrians from danger. For failure to exercise due care in this respect the municipality may be liable in dam-

¹²¹ *City of Covington v. Johnson*, 24 Ky. Law Rep. 602, 69 S. W. 703; *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899; *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319; *Cowle v. Seattle*, 22 Wash. 659, 62 Pac. 121; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *McConnell v. Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778; *Stebbins v. Keene Tp.*, 55 Mich. 552, 22 N. W. 37; *Kellogg v. Janesville*, 34 Minn. 132, 24 N. W. 359.

A city cannot be held liable for an injury caused by a latent defect in a sidewalk without actual notice, where the authorities have used all ordinary and reasonable means to discover it. *Powell v. Bowen*, 92 Ill. App. 453. See *City of Rockford v. Hollenbeck*, 34 Ill. App. 40; *Moon v. Ionia*, 81 Mich. 635, 46 N. W. 25; *Young v. Kansas City*, 45 Mo. App. 600; *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

¹²² *Village of Evanston v. Fitzgerald*, 37 Ill. App. 86; *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309; *City of Franklin v. Harter*, 127 Ind. 446, 26 N. E. 882; *Sweeney v. Butte*, 15 Mont. 274, 39 Pac. 286; *City of Wabasha v. Southworth*, 54 Minn. 79, 55 N. W. 818.

¹²³ *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Gridley v. Bloomington*, 68 Ill. 47; *Id.*, 88 Ill. 554, 30 Am. Rep. 566. But see *Beardsley v. Hartford*, 50 Conn. 542, 47 Am. Rep. 677.

ages.¹²⁴ The municipal duty of reasonable care applies also to things above the sidewalk, such as signboards, poles, and awnings.¹²⁵

Ice and Snow.

The presence of ice and snow upon streets and sidewalks has been a fruitful source of litigation in many states, and many diverse rulings have been made, due in large measure to difference of latitude. Generally, it may be said that in this particular, as in others, the municipal duty requires only reasonable care.¹²⁶ But what is reasonable in Tallahassee may not be in Kalamazoo. Precautions might be necessary in Oshkosh that would not be necessary in Seattle. Statutes have been passed in the New England States prescribing the measure of municipal duty; but such statutes, of course, are of local application only, and are not enacted in the Southern States. The only rule of general application, therefore, must be that of reasonable care in view of climatic and other conditions.¹²⁷

¹²⁴ *Johnston v. Charleston*, 3 S. C. 232, 16 Am. Rep. 721; *Galvin v. New York*, 112 N. Y. 223, 19 N. E. 675; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404. But see *Littlefield v. Norwich*, 40 Conn. 408; *Elliott, Roads & Sts.* p. 453.

¹²⁵ *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192; *Bohen v. Waseca*, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; *Langan v. Atchison*, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; *Domer v. District of Columbia*, 21 App. D. C. 284.

A municipality is bound to exercise careful supervision of electric wires over its streets, and is liable for injury resulting from neglect of such duty, notwithstanding the liability of the owner. *Mooney v. Luzerne*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *Domer v. District of Columbia*, 21 App. D. C. 284; *Contra, City of Fremont v. Dunlap*, 69 Ohio St. 286, 69 N. E. 561.

¹²⁶ *Gaylord v. New Britain*, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752; *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357; *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231; *Bell v. York*, 31 Neb. 842, 48 N. W. 878; *Grossenbach v. Milwaukee*, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614; *Broburg v. Des Moines*, 63 Iowa, 523, 19 N. W. 340, 50 Am. Rep. 756.

¹²⁷ *Paulson v. Pelican*, 79 Wis. 445, 48 N. W. 715; *Mauch Chunk*

BRIDGES AND VIADUCTS.

143. Viaducts and bridges within a municipality are parts of streets, and objects of the same degree of municipal care.

Unless required by mandatory statute, the construction of a bridge by a municipality is within its discretion; and, the location of a bridge being a governmental function, the municipality is not liable at common law for injury resulting therefrom, save to the extent of appropriating private property to public use under the sovereign power of eminent domain.¹²⁸ Under constitutional and statutory rules, however, as we have heretofore seen,¹²⁹ it may be liable as well for property damaged as property taken; and liability has been adjudged in one case upon the ground that the state has no right to undertake improvements in a negligent manner.¹³⁰ A municipal corporation is not liable for injuries resulting from the negligence or erroneous judgment of its officers or agents in the performance of, or omission to perform, duties which are purely discretionary;¹³¹ such as opening or closing the

v. Kline, 100 Pa. 119, 45 Am. Rep. 364; *Olson v. Worcester*, 142 Mass. 536, 8 N. E. 441; *Cloughessey v. Waterbury*, 51 Conn. 405, 50 Am. Rep. 38.

A city is liable for injuries resulting from ice on a sidewalk caused by the packing of snow which had been allowed to remain on the walk several weeks. *Beck v. Buffalo*, 50 App. Div. 621, 63 N. Y. Supp. 499; *Russell v. Toledo*, 19 Ohio Cir. Ct. R. 418, 10 O. C. D. 367. See, also, *Corey v. Ann Arbor*, 124 Mich. 134, 82 N. W. 804; *Ransom v. Belvidere*, 87 Ill. App. 167.

¹²⁸ *Jones v. Keith*, 37 Tex. 399, 14 Am. Rep. 382; *Orth v. Milwaukee*, 59 Wis. 336, 18 N. W. 10.

¹²⁹ Ante, § 112.

¹³⁰ *Hartford County Com'rs v. Wise*, 71 Md. 43, 18 Atl. 31.

¹³¹ *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654.

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street,¹³² changing a grade,¹³³ locating a crossing,¹³⁴ or even suspending a general regulation for the temporary convenience or pleasure of a portion of its people.¹³⁵

Ministerial Functions.

But after the discretionary function of location has been performed and the municipality enters upon the business of construction, it enters the field of ministerial functions, and may become liable for failure to exercise reasonable care in the process of construction. It has accordingly been held that a corporation may be liable for failure to place proper guards and railings around the bridge approaches during the construction,¹³⁶ and also on the approaches and bridge itself after it is completed,¹³⁷ so as to protect persons upon the bridge exercising ordinary care. It must use due care to erect and maintain a reasonably safe structure,¹³⁸ and generally is liable for failure to perform, or for negligent performance of, its duty in regard to bridges, under the same rules as are applicable to streets.¹³⁹ This includes the duty of reasonable

¹³² *Bauman v. Detroit*, 58 Mich. 444, 25 N. W. 391.

¹³³ *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

¹³⁴ *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369.

¹³⁵ *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105; *Hill v. Board*, 72 N. C. 55, 21 Am. Rep. 451; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787.

¹³⁶ *Weirs v. Jones County*, 80 Iowa, 351, 45 N. W. 883; *Mullen v. Rutland*, 55 Vt. 77; *Doherty v. Braintree*, 148 Mass. 495, 20 N. E. 106.

¹³⁷ *Corballis v. Newberry Tp.*, 132 Pa. 9, 19 Atl. 44, 19 Am. St. Rep. 588; *Langlois v. Cohoes*, 58 Hun, 226, 11 N. Y. Supp. 908; *City of Rosedale v. Golding*, 55 Kan. 167, 40 Pac. 284.

¹³⁸ *Perkins v. Oxford*, 66 Me. 545; *Jordan v. Hannibal*, 87 Mo. 673.

Where a city, under no obligation to do so, attempts to build approaches to a canal bridge built over the canal by the canal trustees, it is liable for damages caused by their defective condition. *City of Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342.

¹³⁹ *Village of Marselles v. Howland*, 124 Ill. 547, 16 N. E. 883; 2 Dill. Mun. Corp. § 728.

inspection and notice of danger, and for failure to exercise these duties municipalities have been held liable for defect in the floor,¹⁴⁰ in the railings of a bridge,¹⁴¹ and for failure to close or warn the public of a dangerous bridge.¹⁴²

DRAINS AND SEWERS.

144. A municipality may also be liable for misfeasance or nonfeasance in the performance of its duty to exercise reasonable care in the construction and maintenance of its drains and sewers.

It is well settled that in deciding to build sewers and in choosing a plan the municipality is exercising governmental discretion, and therefore incurs no liability for the negligence or mistakes of its agents;¹⁴³ but it is equally well settled by

¹⁴⁰ *Langlois v. Cohoes*, 58 Hun, 226, 11 N. Y. Supp. 908; *Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425; *Mayor, etc., of City of Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719; *Lee County v. Yarbrough*, 85 Ala. 590, 5 South. 341; *Lyman v. Hampshire*, 140 Mass. 311, 3 N. E. 211.

¹⁴¹ *City of Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526.

¹⁴² *Carney v. Marseilles*, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; *Albrittin v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Humphreys v. Armstrong County*, 3 Brewst. (Pa.) 49; *City of Erie v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87. See, also, *Cunliff v. Albany*, 2 Barb. (N. Y.) 190. But see *City of Albany v. Cunliff*, 2 N. Y. 165.

¹⁴³ *Betham v. Philadelphia*, 196 Pa. 302, 46 Atl. 448; *Pressman v. Dickson City*, 13 Pa. Super. Ct. 236; *Burger v. Philadelphia*, 196 Pa. 41, 46 Atl. 262; *Bealafeld v. Verona*, 188 Pa. 627, 41 Atl. 651; *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88; *Champion v. Crandon*, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 850; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Mills v. Brooklyn*, 32 N. Y. 489; *Perry v. Worcester*, 6 Gray (Mass.) 544, 66 Am. Dec. 431; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; *Child v. Boston*, 4 Allen (Mass.) 41, 81 Am. Dec. 680.

Where the municipal authorities have adopted a plan of sewerage, they are not liable for damages resulting from an insufficiency in size

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a great preponderance of authority that a municipality is liable for damages resulting from its neglect to properly discharge its ministerial duty to exercise reasonable care in the construction and maintenance of its sewers.¹⁴⁴ Even the New England States, and others, denying municipal liability for defective streets, generally recognize and enforce this rule with regard to sewers.¹⁴⁵ The courts do not concur as to the ground of this distinction between sewers and streets; nor is there here space to set them forth. They are more interesting than important, and the curious are referred to the able opinion of Judge Holmes in a leading Massachusetts case.¹⁴⁶ The true ground of responsibility for negligence in the care of sewers seems to be the same as in the care of highways, namely, the corporation has neglected its municipal duty to exercise rea-

of the sewers, though they may be for injuries resulting from negligence in their construction. *Cooper v. Scranton City*, 21 Pa. Super. Ct. 17. Mere omission of the municipality to provide adequate means for carrying off the water which accumulates will not sustain an action. *Id.* See *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

But a city is not an insurer of the condition of its sewers, though it is bound to use reasonable care in keeping them in repair. *Weidman v. New York*, 84 App. Div. 321, 82 N. Y. Supp. 771.

¹⁴⁴ *Chalkley v. Richmond*, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730. And the question of liability of the city is not affected by the fact that the sewer was originally built by the state. *Id.* See *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; *City of Baltimore v. Schnitker*, 84 Md. 34, 34 Atl. 1132; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Kranz v. Baltimore*, 64 Md. 491, 2 Atl. 908; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *City Council of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181.

¹⁴⁵ *Gillman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; *Judge v. Meriden*, 38 Conn. 90.

¹⁴⁶ *Bates v. Westborough*, *supra*.

sonable diligence in the care and management of property under its control.¹⁴⁷ Municipal ownership is not essential to liability; municipal control will be sufficient.¹⁴⁸ On the contrary, municipal ownership of the land over which the drain or sewer runs is not sufficient to cause liability;¹⁴⁹ municipal control is essential. And it has been held that when a sewer runs partly through private and partly through municipal property the corporation is liable for the entire damage done by overflow at its outlet.¹⁵⁰ In one of the two states¹⁵¹ least inclined to the doctrine of municipal liability for neglect to repair sewers, the Supreme Court, after elaborate consideration, expressed this conclusion: "The defendant is not responsible for the consequences of a break in the sewer in question per se, even though it be the result of the carelessness of its own agents, for the public is not responsible for such misfeasances of its officers; but when such break has occurred, occasioning a private nuisance exclusively, and the public authorities have been notified of the accident, we think that then they owe a duty to the individual to put the sewer in a proper condition, and that for the nonperformance of such duty an action will lie."¹⁵² It has been held that a municipality is liable for damages sustained by individual owners from the flooding of their premises by drains or sewers;¹⁵³ and from the depositing

¹⁴⁷ *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289.

¹⁴⁸ *Taylor v. Austin*, 32 Minn. 247, 20 N. W. 157.

¹⁴⁹ *Kosmak v. New York*, 117 N. Y. 361, 22 N. E. 945.

¹⁵⁰ *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030.

A municipal corporation having power to construct sewers in its streets is liable for improperly locating and constructing the outlet of a sewer, which is principally located along the streets, so as to discharge the sewage on plaintiff's premises, though the lower part of the sewer, including the outlet, is located on private grounds. *Id.* See *Beach v. Elmira*, 58 Hun, 606, 11 N. Y. Supp. 913.

¹⁵¹ California and New Jersey.

¹⁵² *Jersey City v. Kiernan*, 50 N. J. Law, 246, 13 Atl. 170. Cf. *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158.

¹⁵³ *McCartney v. Philadelphia*, 22 Pa. Super. Ct. 257; *Semple v. Ing. Corp.*—28

of sewage upon their lands, though this be a necessary result of the plan adopted.¹⁵⁴ So, also, damages may be recovered by private action for the pollution of a stream by sewage so as to render the water unfit for use by the riparian owner or occupier;¹⁵⁵ and in some cases the municipality has been enjoined from emptying its sewage into a running stream, where-by a public nuisance was created.¹⁵⁶

Vicksburg, 62 Miss. 63, 52 Am. Rep. 181; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703.

A city is not liable because surface water flows from a street upon an adjoining lot. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 206, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153. Cf. *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53.

¹⁵⁴ *Bennett v. Marion*, 119 Iowa, 473, 93 N. W. 558; *McBride v. Akron*, 12 Ohio Cir. Ct. R. 610, 6 O. C. D. 739; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858; *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9; *Magee v. Brooklyn*, 18 App. Div. 22, 45 N. Y. Supp. 473; *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; *Attwood v. Bangor*, 83 Me. 582, 22 Atl. 466; *City of Nashville v. Comar*, 88 Tenn. 415, 12 S. W. 1027; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030.

¹⁵⁵ *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

The pollution of a flowing stream by emptying into it the sewage of a city, contaminating and poisoning its waters, and rendering it unfit for use by persons through whose premises it flows, is a public nuisance. *Mayor, etc., of Birmingham v. Land*, 137 Ala. 538, 34 South. 613; *City of Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; *Owens v. Lancaster*, *supra*.

It has been held that a city has the right to construct drains to conduct the surface water from its streets into a ditch or drain which is a natural water course, so long as reasonable care and skill are exercised in doing the work. *Miller & Meyers v. Newport News*, 101 Va. 432, 44 S. E. 712.

¹⁵⁶ *Haskell v. New Bedford*, 108 Mass. 208; *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *People v. San Luis Obispo*, 116 Cal. 617, 48 Pac. 723.

RESPONDEAT SUPERIOR.

145. The liability of municipal corporations in most cases of tort rests upon the general doctrine of the common law that the master is liable for the wrongs done by the servant when acting within the scope of his employment.

The difficulties encountered in the application of this doctrine to private corporations, as shown in the multitude of adjudged cases upon the subject, are enhanced in its attempted application to municipalities. What officers are agents, and what acts of theirs may render the municipality liable for tort, are questions of inherent difficulty, because of the dual nature of the corporation. Obviously, there can be no liability for tort unless there has been a violation of some municipal duty; nor can a corporation be held liable for the acts of officers whom it does not control. But the corporation may be liable for the conduct of officers not appointed by it, but by the state for it.¹⁵⁷ In a leading case in New York the following test of liability has been declared: "To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality."¹⁵⁸ An able author on the subject has thus stated the rule governing liability in such cases: "For the acts of an independent officer, whose duties are fixed and prescribed by law, the city cannot be held chargeable upon the principle of respondeat superior, for the relation of master and servant does not exist. Such officers are quasi civil officers of

¹⁵⁷ *BAILEY v. MAYOR*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472.

¹⁵⁸ *Pettengill v. Yonkers*, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

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universal, recognition in America by the concurrent decision of the courts for almost a century.¹⁶⁸ It was applied in civil actions for torts caused by the malfeasance of corporation officers or agents when pursuing any undertaking not within the scope of municipal purposes or powers, express, inherent or implied; and it still remains the general doctrine of the courts, though not so firmly established and universally recognized as formerly.

Salt Lake City Case.

The stability of this doctrine of the law is supposed to be shaken by the decision of the Supreme Court of the United States in the unique case of *Salt Lake City v. Hollister*,¹⁶⁹ wherein Mr. Justice Miller, in delivering the opinion of the court, said: "The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers, who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to pecuniary responsibility for them to the party injured."¹⁷⁰ Concerning this a recent author says: "The effect of this decision is to broaden materially the view of liability of municipal corporations for torts, and it is a strong authority in support of the contention that these bodies should be liable for negligence in respect to their ultra vires acts. * * * Such an act of the corporation is made doubly wrongful by the fa

¹⁶⁸ *Wabaska Electric Co. v. Wymore*, 60 Neb. 199, 82 N. W. 626.

The acts of city authorities in cutting a ditch along the side of a lot outside the city limits are ultra vires, and hence the city is not liable for injuries resulting therefrom to the lot owner. *Lo v. Columbus*, 90 Ga. 20, 15 S. E. 818.

¹⁶⁹ 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176.

¹⁷⁰ 118 U. S. 261, 6 Sup. Ct. 1058, 30 L. Ed. 176.

that it is in excess of the corporate power, and for the damages resulting from it the corporation should respond." ¹⁷¹ On the contrary, Judge Dillon, in a brief criticism of the comprehensive language of this opinion, says: "The judgment of the court, which, on the special facts, was unquestionably sound, need not necessarily rest upon so broad a basis as the one above indicated, and the observation of the court in the opinion must be limited accordingly. * * * Such a view, if sound as respects private corporations, would seem not to be so as respects municipal corporations, whose powers are defined and limited for the express purpose of protecting the inhabitants from just such liability." ¹⁷²

Doctrine not Unsettled.

An examination of this case shows the foregoing language of Mr. Justice Miller to be an obiter dictum, and supports the criticism of Judge Dillon. Salt Lake City, having erected a distillery, proceeded without authority to engage in the business of distilling spirits, and while so doing, in violation of the United States revenue laws, made fraudulent returns of the quantity of spirits produced. Its fraud was detected, and a lawful assessment made upon the city as a distiller for the gallon tax upon the liquor actually produced and fraudulently omitted from the required report. To enforce the collection of this tax and penalty, the government was about to seize municipal property, whereupon the city, to save its property, paid the tax under protest, and then brought action against the collector to recover the amount so paid. The ground of its action was that the business of distilling spirits by Salt Lake City was ultra vires. The very impudence of the contention provoked the court to pungent ridicule of the plaintiff's action, ¹⁷³ and naturally strong language was used in refuting

¹⁷¹ Jones, Negl. Mun. Corp. § 177.

¹⁷² 2 Dill. Mun. Corp. p. 1192, note.

¹⁷³ "It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which

its absurd contention and denying its demand. But the question in the case was not whether a municipality is liable in civil action to an individual injured by the tortious acts of its agents or officers *ultra vires*, but only whether it could recover from the government a sum of money paid under protest to avoid seizure of its property for a lawful tax and penalty. And accordingly the digest syllabus thus accurately expresses the decision in the case: "A municipal corporation engaged in the business of distilling spirits is subject to internal revenue taxes under the laws of the United States, whether its acts in this respect are or are not *ultra vires*." ¹⁷⁴ The gist of the decision is found in the following excerpt from the opinion: "A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally; and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction, by whomsoever conducted." ¹⁷⁵

The fundamental rules of law upon which a person or corporation becomes liable for a tax are so widely different from those which declare liability for a tort that even these cogent words of Justice Miller, used *arguendo* in the decision of the revenue case, are not likely to unsettle the logical rule as to torts to private individuals established by the concurrent decisions of courts of last resort through scores of years in the United States.

would be unauthorized by their charters or articles of incorporation for they would thus escape taxation, and ruin all competition." U. S. 259, 6 Sup. Ct. 1057, 30 L. Ed. 176.

¹⁷⁴ 3 Russ & W. Syl. Dig. p. 3517.

¹⁷⁵ 118 U. S. 262, 6 Sup. Ct. 1059, 30 L. Ed. 176.

CHAPTER XVII.**DEBTS, FUNDS, EXPENSES, AND ADMINISTRATION.**

- 147. Indebtedness.
- 148. Limitation of Indebtedness.
- 149. Municipal Bonds.
- 150. Borrowing Money.
- 151. Express and Implied Power to Issue.
- 152. Municipal Warrants.
- 153. Funds.
- 154. Rights of Creditors.
- 155. Expenses.
- 156. Budget.
- 157. Claims.
- 158. Appropriation.

INDEBTEDNESS.

- 147. Within the scope of its charter powers, a municipality, in the exercise of corporate functions and transaction of municipal affairs, may incur indebtedness to any extent not forbidden by law.**

A municipal corporation, as an agency of the state for more efficient local government, must inevitably incur expenses in the necessary performance of its various municipal functions. These expenses, unless paid for as fast as incurred, stand as obligations of the municipality, to be met and discharged like those of other corporations and individuals under the law. For this purpose the power of taxation is conferred upon the municipality, and thus annually it is supposed to receive sufficient revenue to discharge its indebtedness. But so rapid has been the growth of American cities and towns that it has been found impossible in practice to provide annual revenues equal to the annual expenditures; much less to provide them in advance. From this it results that American municipalities, as

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a rule, live in the condition of constant indebtedness, extensions to which are of very rare occurrence.

Amount.

Clothed with the power of eminent domain, and the inherent power to contract, and required to exercise police powers, and some of these at its peril, a municipality must necessarily incur large expense, the amount of which, under American rules of local self-government, properly rests in the discretion of the municipality; and, in the absence of constitutional or statutory limitations, this discretion as to amount is unbounded.¹ The law is, however, imperative that to constitute a valid indebtedness, the expenditure must be incurred within charter powers and for municipal purposes.² Within these boundaries the municipality may go on incurring indebtedness at its pleasure to the statutory limit.

LIMITATION OF INDEBTEDNESS.

148. Limitation to municipal indebtedness may be fixed by statute or constitution, beyond which no obligation can be incurred by the municipality.

Limitations upon municipal indebtedness, either by constitution or statute, are to be found in nearly all the American states. The limit is usually fixed at a certain per centum or aliquot part of the total assessed value of real estate, or of real and personal property, in the corporate limits.³ The for

¹ *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617; *Clarksburg v. Galena*, 48 Ill. 423, 95 Am. Dec. 557.

² *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 114, 144 U. S. 549, 12 Sup. Ct. 975, 36 L. Ed. 399; *CLARK v. MOINES*, 19 Iowa, 199, 87 Am. Dec. 423; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554; *HASBROUCK v. MILWAUKEE*, 37 Wis. 37, 80 Am. Dec. 718; *Hequembourg v. Dunkirk*, 49 Hun. 2 N. Y. Supp. 447.

³ *Nalle v. Austin* (Tex. Civ. App.) 42 S. W. 780; *Duncan v. Chambersburg*, 60 S. C. 532, 39 S. E. 265; *Keller v. Scranton*, 200 Pa. 13.

such constitutional inhibition is usually such as to prevent either the legislature or the municipality from passing the constitutional limit; in which case all indebtedness, howsoever incurred, beyond this limitation is void.⁴ Limitation may also

Atl. 781, 86 Am. St. Rep. 708; *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681; *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 553; *Weber v. Dillon*, 7 Okl. 568, 54 Pac. 894; *Phillips v. Reed*, 107 Iowa, 331, 76 N. W. 850; *Freeman v. Huron*, 10 S. D. 368, 73 N. W. 260; *Darling v. Taylor*, 7 N. D. 538, 75 N. W. 766; *School Town of Winamac v. Hess*, 151 Ind. 229, 50 N. E. 81; *Graham v. Spokane*, 19 Wash. 447, 53 Pac. 714; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803; *Roff v. Calhoun*, Id.; *Swanson v. Ottumwa*, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620; *Beck v. St. Paul*, 87 Minn. 381, 92 N. W. 328; *Kronsbein v. Rochester*, 78 App. Div. 494, 78 N. Y. Supp. 813; *City of Austin v. Valle* (Tex. Civ. App.) 71 S. W. 414; *People v. City Council*, 23 Utah, 13, 64 Pac. 460. See, also, *Browne v. Boston*, 179 Mass. 321, 60 N. E. 934.

The Constitution of Pennsylvania illustrates such an inhibition in few words: "The debt of any city, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein."

Where the actual and assessed value of taxable property is not the same, the computation is to be made upon the assessed value. *City Water Supply Co. v. Ottumwa* (C. C.) 120 Fed. 309.

⁴ *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Grady v. Landram*, 23 Ky. Law Rep. 506, 63 S. W. 284; *Duncan v. Charleston*, supra; *City of Helena v. Mills*, 94 Fed. 916, 36 C. C. A. 1; *City Water Supply Co. v. Ottumwa*, supra; *German Ins. Co. of Freeport v. Manning* (C. C.) 95 Fed. 597. See *State v. Quayle*, 26 Utah, 26, 71 Pac. 1060; *City of Baltimore v. Gill*, 31 Md. 375; *People v. May*, 9 Colo. 80, 10 Pac. 641; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *LITCHFIELD v. BALLOU*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *SPILMAN v. PARKERSBURG*, 35 W. Va. 605, 14 S. E. 279; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; *City of Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; *John Hancock Mut. Life Ins. Co. v. Huron*, 100 Fed. 1001, 40 C. C. A. 683; *Prickett v. Marcelline* (C. C.) 65 Fed. 469.

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be fixed in the charter, or by general statute, which cannot be transgressed by the municipality;⁵ but such boundary fixed by the legislature may likewise be transgressed by the municipality, and indebtedness beyond the statutory limit may be imposed upon the municipality by the legislature.⁶

Kinds of Indebtedness.

The recognized classes of municipal indebtedness are (1) bonded and (2) current; and much contention has arisen in consequence of the joint efforts of reckless municipal and speculative investors to transgress the prescribed limits as to whether the prohibition included all classes of municipal indebtedness. In some cases there is manifested a disposition in the courts to give liberal construction to such limitations, but by far the greater weight of authority favors such a strict construction of these statutory and constitutional prohibitions as will include all classes of debts, and thereby protect the citizens from overburdensome taxation.⁸

⁵ *Jutte & Foley Co. v. Altoona*, 94 Fed. 61, 36 C. C. A. 84; *McALD v. NEW YORK*, 68 N. Y. 23, 23 Am. Rep. 144; *Keen v. Jersey City*, 47 N. J. Law, 449, 1 Atl. 511; *Nelson v. Mayor*, 100 N. Y. 535; *Mayor of Rome v. McWilliams*, 67 Ga. 106.

⁶ *Mosher v. School Dist.*, 44 Iowa, 122.

⁷ *Wells v. Sioux Falls* (S. D.) 94 N. W. 425; *Barnard & Co. v. County* (C. C.) 37 Fed. 563, 2 L. R. A. 426; *KELLY v. MINNEAPOLIS*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; *State v. Common Council*, 96 Wis. 73, 71 N. W. 86; *Todd v. Laurens*, 48 S. C. 26 S. E. 682.

⁸ *Schultze v. Manchester*, 40 Atl. 589; *City of Chicago v. Mayor*, 176 Ill. 404, 52 N. E. 982; *City of Laporte v. Telegraph*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359; *City of Walla Walla v. Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Niles Water Works v. Mayor*, 59 Mich. 311, 26 N. W. 525; *City of Eureka*, 124 Cal. 61, 56 Pac. 612; *Lake County v. Graham*, 100 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; *People v. May*, 9 Colo. 15 Pac. 36; *District Tp. of Doon v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044; *Francis v. Howard County* (C. C.) 50 Fed.

Sum Total—How Computed.

By the weight of judicial opinion the total amount of municipal indebtedness is to be ascertained by adding together all bonded and current indebtedness,⁹ including both imposed and voluntary, and not only present but future obligations, if they be vested or fixed,¹⁰ and also the annual sum payable upon any continuing contract of rental or service.¹¹ The sum total thus ascertained will be the limit to the municipal power to incur indebtedness.

MUNICIPAL BONDS.

149. Municipal bonds are now generally understood to mean negotiable bonds issued by a municipality as security for its indebtedness.

Municipal bonds are not necessarily negotiable. They may in form lack some element of negotiability, or may include some phrase rendering them nonnegotiable. But the custom of making such bonds negotiable in form has become so prevalent as to be almost universal, and the term "municipal bonds"

⁹ *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *LITCHFIELD v. BALLOU*, 114 U. S. 180, 5 Sup. Ct. 820, 29 L. Ed. 132; *Lake County v. Rollins*, 136 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970.

¹⁰ *City of Laporte v. Telegraph Co.*, 146 Ind. 466, 45 N. E. 588, 85 L. R. A. 686, 58 Am. St. Rep. 359; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 222; *Niles Water Works Co. v. Mayor*, supra.

¹¹ *Baltimore & O. S. W. R. Co. v. People*, 200 Ill. 541, 66 N. E. 148; *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *Lott v. Mayor*, 84 Ga. 681, 11 S. E. 558; *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854; *City of East St. Louis v. Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782. But see *City of Centerville v. Guaranty Co.*, 118 Fed. 332, 55 C. C. A. 348; *Cain v. Wyoming*, 104 Ill. App. 533; *Niles Water Works Co. v. Mayor*, supra; *State v. Medbery*, 7 Ohio St. 523.

in modern parlance implies negotiability.¹² They are usually issued as security for a loan of money to the municipality. But sometimes they are used to subsidize a quasi public corporation engaged in some undertaking of advantage to the municipality, such as a railroad, gas, water, or electric company.

BORROWING MONEY.

150. Express power to incur indebtedness by borrowing money on the municipal credit may be conferred upon a municipal corporation either by charter or by general law.

Like power may also be implied as appropriate and necessary for the proper and efficient exercise of the municipal powers expressly conferred upon the corporation.

Lacking express or implied power for such purposes, a municipality does not possess inherent power to incur municipal indebtedness by borrowing money on municipal credit.

Until the era of municipal extravagance had come to America, municipal corporations had been wont to borrow money and give their notes or bonds therefor, without serious question as to the existence or source of such power. It had accordingly been recognized in several cases that notes or bonds given by municipalities for money borrowed were valid municipal obligations.¹³ And it is still generally, and universally, conceded that a municipal corporation, under express authority or authority clearly implied, may incur indebtedness by borrowing money for municipal purposes.¹⁴ Upon recent challenge it has been declared in the State

¹² Black, Law Dict. tit. "Municipal Bonds."

¹³ *City of Quincy v. Warfield*, 25 Ill. 317, 79 Am. Dec. 33; *Voss v. Richmond*, 18 Grat. (Va.) 338, 98 Am. Dec. 647, and *BANK OF CHILLICOTHE v. CHILLICOTHE*, 7 Ohio, 31, 18 Am. Dec. 185; *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 185.

¹⁴ *City of Tyler v. L. L. Jester & Co.* (Tex. Civ. App.) 74 S. W. 1 Dill. Mun. Corp. §§ 117-120, and notes.

Court of the United States that the power to borrow money is not an incidental and necessary power of a municipal corporation;¹⁵ and that to create a valid indebtedness for money borrowed by a municipality there must exist either express authority, or the same must be clearly implied from granted powers.¹⁶ To this view has been added the great weight of the opinion of Judge Dillon,¹⁷ and the concurrence of some of the state Supreme Courts,¹⁸ and it is probable that the preponderance of judicial opinion is against the inherent power of a municipality to borrow money. There are certain contrary decisions, however, which are irreconcilable with this view;¹⁹ but many of the cases supposed to favor the inherent power of a corporation to borrow money will be found on close scrutiny, and limitation of the language to the facts of the cases, to be authority only for the doctrine that this power may be implied as necessary and proper to carry out the express powers conferred upon the municipality.²⁰ It is believed, therefore, that the great majority of the adjudged cases can

¹⁵ Opinion of Bradley, J., in *MAYOR OF NASHVILLE v. RAY*, 19 Wall. (U. S.) 479, 22 L. Ed. 164.

¹⁶ *MAYOR OF NASHVILLE v. RAY*, 19 Wall. (U. S.) 468, 22 L. Ed. 164. See, also, *Watson v. Huron*, 97 Fed. 449, 38 C. C. A. 264.

¹⁷ 1 Dill. Mun. Corp. § 125.

¹⁸ *Swackhamer v. Hackettstown*, 37 N. J. Law, 191; *Robertson v. Breedlove*, 61 Tex. 316; *Allen v. Lafayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497.

The power to borrow money, incur indebtedness, and issue bonds on behalf of the people of the state or any subdivision thereof is the function of the legislature to exercise itself, or to delegate to municipal or quasi municipal corporations. *Board of Com'rs of Seward County v. Insurance Co.*, 90 Fed. 222, 32 C. C. A. 585.

¹⁹ *Miller v. Board*, 66 Ind. 162; *City of Williamsport v. Com.*, 84 Pa. 487, 24 Am. Rep. 208; *Com. v. Pittsburgh*, 41 Pa. 278; *BANK OF CHILLICOTHE v. CHILLICOTHE*, 7 Ohio St. 31, pt. 2, 30 Am. Dec. 185.

²⁰ *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *Clarke v. School Dist.*, 3 R. I. 199; *State v. Babcock*, 22 Neb. 614, 35 N. W. 941; *Curtis v. Leavitt*, 15 N. Y. 9; *City of Richmond v. McGirr*, 78 Ind. 192; *Wells v. Sallna*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759.

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be reconciled upon the basis of the sound and safe doctrine stated in the heading of this section.

EXPRESS AND IMPLIED POWER TO ISSUE.

- 151. Authority to issue municipal bonds is not inherent in a municipality, but may be expressly conferred on the legislature, or may be implied as necessary to the exercise of the express powers.**

This subject, like the preceding one, has undergone much judicial examination, and there are cases holding that the power to issue bonds is inherent in the municipality;²¹ in most of these cases on examination will be found as sustaining rather the implied than the inherent power of a municipality to issue bonds, and it is believed that the great majority of the apparently conflicting decisions on this subject, as well as on the subject of borrowing money, may be reconciled upon the foregoing statement.²² This power to issue negotiable paper will be implied from the express power to borrow money;²³ but the courts have been generally averse to any implication where the bonds are to be used as municipal bonds to the construction of a railroad, either by subscription to stock or purchase of bonds.²⁴ Usually the statute authorizing

²¹ *Com. v. Pittsburgh*, 41 Pa. 278; *Clark v. Janesville*, 10 Wis.

²² An inherent power exists in the municipality as an essential function of its corporate existence, and independent of its grant by the legislature. *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766.

²³ *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Voss v. Richmond*, 18 Grat. (Va.) 338, 98 Am. Dec. 647; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069.

²⁴ *Fisk v. Kenosha*, 26 Wis. 23; *Williamson v. Keokuk*, 44 Mo. 88; *Pitzman v. Freeburg*, 92 Ill. 111; *Coloma v. Eaves*, 92 U. S. 23 L. Ed. 579; *Mississippi, O. & R. R. Co. v. Camden*, 23 Fla. 300; *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. 189; *York v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. Ed. 356.

But in *Jennings Banking & Trust Co. v. Jefferson*, 30 Tex. App. 534, 70 S. W. 1005, it was held that where a city charter authorizes the issuance of bonds to aid in the construction of

issuance of such bonds provides for a submission of the question to popular vote, and authorizes their issuance only when favored by a majority of the electors or taxpayers of the municipality.

Validity.

Municipal bonds, being generally issued for the purpose of obtaining a loan of money on favorable terms, are made payable to bearer and passed by delivery. They are therefore held free from all equities which might exist in favor of the corporation,²⁵ and the only defense open to the municipality is want of authority for their issuance.²⁶ Upon this subject the same considerations are pertinent and rules applicable as have been heretofore set forth in regard to county bonds.²⁷

roads to and from the city, the authority to issue bonds for the purchase of lands for depots would be implied. See *Wetzell v. Paducah* (C. C.) 117 Fed. 647.

²⁵ *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215, 65 N. E. 978.

²⁶ Ante, § 24. *Clarke v. Northampton*, 120 Fed. 661, 57 C. C. A. 123; *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 950, 30 L. Ed. 911; *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3; *Everett v. School Dist.* (C. C.) 109 Fed. 697; *Clifton Forge v. Bank*, 92 Va. 283, 23 S. E. 284.

Where a municipality issues bonds which it had no authority to issue under its charter, it cannot subsequently validate its bonds by ratification. *Uncas Nat. Bank v. Superior*, 115 Wis. 340, 91 N. W. 1004.

²⁷ Ante, § 24. *Fernald v. Gilman* (C. C.) 123 Fed. 797; *City of Defiance v. Schmidt*, 123 Fed. 1, 59 C. C. A. 159; *Rondot v. Rogers Tp.*, 99 Fed. 202, 39 C. C. A. 462; *Edwards v. Bates County* (C. C.) 117 Fed. 526; *City of Beatrice v. Edminson*, 117 Fed. 427, 54 C. C. A. 601; *King v. Superior*, 117 Fed. 113, 54 C. C. A. 499; *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167; *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390.

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MUNICIPAL WARRANTS.

152. The current indebtedness of a municipality is usually evidenced by warrants or orders, which the municipality has inherent power to issue through its officers.

Municipal orders or warrants are informal checks or drafts by one municipal officer upon another for the payment of a certain sum of money.²⁸ They do not constitute municipal securities, but are merely conveniences in municipal administration of its finances.²⁹ These warrants are usually not negotiable,³⁰ and do not bear interest.³¹ They are not intended to be used as currency, though they are assignable;³² but in the hands of any person the city is entitled to all equities against the original payee.³³ It is expected that they will

²⁸ CLARK v. DES MOINES, 19 Iowa, 199, 87 Am. Dec. 423; v. Sims, 23 N. Y. 570.

²⁹ School Dist. Tp. v. Lombard, 2 Dill. (U. S.) 493, Fed. Cas. 12,478; Dana v. San Francisco, 19 Cal. 486.

³⁰ Hubbell v. Custer City, 15 S. D. 55, 87 N. W. 520; First Bank v. Gates, 66 Kan. 505, 72 Pac. 207, 97 Am. St. Rep. 383; of Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784; Goodv. East Hartford, 70 Conn. 18, 38 Atl. 876; Bardsley v. Sternber Wash. 243, 49 Pac. 499; Watson v. Huron, 97 Fed. 449, 38 C. 264; CLARK v. DES MOINES, 19 Iowa, 199, 87 Am. Dec. 423.

³¹ City of Pekin v. Reynolds, 31 Ill. 529, 83 Am. Dec. 244; Park Com'rs v. Dunlevy, 91 Ill. 49.

They may, however, draw interest after presentation, demand payment, and refusal. Fernandez v. New Orleans, 42 La. A. 7 South. 57.

But see Kenyon v. Spokane, 17 Wash. 57, 48 Pac. 783; Quincy v. Warfield, 25 Ill. 317, 79 Am. Dec. 330.

³² Grayson v. Latham, 84 Ala. 546, 4 South. 200; Clark v. County, 19 Iowa, 248; Brown v. Jacobs, 77 Wis. 27, 45 N. W. 67.

³³ Gilman v. Gilby, 8 N. D. 627, 80 N. W. 889, 73 Am. St. Rep. Casey v. Pilkington, 83 App. Div. 91, 82 N. Y. Supp. 525; H. v. Custer City, 15 S. D. 55, 87 N. W. 520; Speer v. Board, 88 Fed. 32 C. C. A. 101; Matthis v. Cameron, 62 Mo. 504.

A holder of city warrants has only the rights of the original payee.

paid out of current taxes,⁵⁴ and therefore they rarely exceed them in amount. They may be the basis of action against the municipality, but not until after presentation for payment and refusal.⁵⁵

FUNDS.

153. Municipal revenues are usually divided into funds which represent the various sums of money appropriated by the council for the payment of specified kinds of indebtedness; e. g., a school fund, interest fund, street fund, sinking fund, and the like.

The warrants of the municipality are usually drawn upon some special fund, and are to be paid out of that fund in the order in which they are presented and accepted by the disbursing officer.⁵⁶ If the fund be exhausted, such warrant is not then payable out of other money in the municipal treasury,⁵⁷ but may be payable out of the same fund the following year.⁵⁸

since the rules pertaining to negotiable instruments do not apply. *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 150, 52 Pac. 1015.

⁵⁴ *MAYOR OF NASHVILLE v. RAY*, 19 Wall. (U. S.) 477, 22 L. Ed. 164; *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598.

⁵⁵ *Freeman v. Huron*, 10 S. D. 368, 73 N. W. 260; *Travelers' Ins. Co. v. Denver*, 11 Colo. 434, 18 Pac. 556; *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710; *International Bank v. Franklin County*, 65 Mo. 105, 27 Am. Rep. 261; *Varner v. Nobleborough*, 2 Greenl. (Me.) 126, 11 Am. Dec. 48; *City of Pekin v. Reynolds*, 31 Ill. 529, 28 Am. Dec. 244.

⁵⁶ *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251; *La France Fire Engine Co. v. Davis*, 9 Wash. 600, 38 Pac. 154; *Hubbell v. Custer City*, 15 S. D. 55, 87 N. W. 520; *Quaker City Nat. Bank v. Tacoma*, supra; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115; *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598; *Benson v. Carmel*, 8 Greenl. (Me.) 112.

⁵⁷ *McCullough v. Mayor*, 23 Wend. (N. Y.) 458.

Warrants issued by a city for street improvements, to be paid out

⁵⁸ *Western Town Lot Co. v. Lane*, 7 S. D. 1, 62 N. W. 982; *Phillips v. Reed*, 107 Iowa, 331, 76 N. W. 850.

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Specific Funds.

These separate funds represent the assessment and appropriation of annual revenues to specific objects, and are several devoted to those purposes.³⁹ The financial agents or officers of the corporation must administer those funds in accordance with the general rules of the council setting them apart for specific purposes.⁴⁰ They have no power to divert these funds to different objects, and may be liable for so doing.⁴¹

RIGHTS OF CREDITORS.

- 154. Creditors may by contract obtain a vested interest in municipal funds so that the same cannot be taken from them either by municipal or legislative action.**

It often happens in the administration of municipal affairs that contractors doing work of improvement for the municipality have been promised compensation out of certain municipal funds; or that a loan of money has been obtained upon the credit of some specific municipal fund; or that creditors of the municipality have been induced to refund their existing obligations at a lower rate of interest, or even to reduce the principal of the debt, upon guaranty of payment out of some specific source of municipal revenue. This stipulation may apply

to a special fund, cannot be collected against the city generally, though the remedy to collect from the special fund is lost. *Wills v. Aberdeen*, 19 Wash. 89, 52 Pac. 524.

³⁹ *People v. Wood*, 71 N. Y. 371; *Bates v. Porter*, 74 Cal. 224, 5 Pac. 732.

⁴⁰ *Schultze v. Manchester*, 61 N. J. Law, 513, 40 Atl. 589; *Schultze v. Cook*, 43 Neb. 318, 61 N. W. 693; *Boro v. Phillips Co.*, 4 Dill. Fed. Cas. No. 1,663; *Priet v. Reis*, 93 Cal. 85, 28 Pac. 798.

When a draft or warrant drawn by the proper officer, and in proper form, is presented to a treasurer, it is no part of his duty to inquire into the legality of the consideration for which it was given. *V. v. Oller*, 16 Pa. Co. Ct. R. 235.

⁴¹ *Blair v. Lantry*, 21 Neb. 247, 31 N. W. 790; *City of East St. Louis v. Flannigan*, 34 Ill. App. 596. See *Bates v. Porter*, 74 Cal. 224, 5 Pac. 732; *Priet v. Reis*, 93 Cal. 85, 28 Pac. 798.

either in the contract or the municipal ordinance, or the statute under which the action is taken. In all such cases, unless the fund pledged is strictly governmental in its nature, so as to be incapable of being pledged,⁴² the creditor obtains a vested interest in the fund,⁴³ which is protected by the contract clause of the federal Constitution; and his right cannot be impaired by subsequent legislation, either by the state or the municipality.⁴⁴ Sinking funds have been held to be peculiarly within the protection of this constitutional provision, and any legislation void which tends to impair the creditor's contractual security.⁴⁵ The same doctrine may be applied with equal force to any other special municipal fund which has been likewise pledged as security for municipal debt,⁴⁶ though in some cases the creditor has been denied the full measure of this constitutional protection.⁴⁷ But a pledge of the entire municipal revenues, or of the ordinary revenues employed in performing strictly governmental functions, would be obviously void as an unwarranted surrender of sovereign power;⁴⁸ in other words, such

⁴² *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *DAVIS v. NEW YORK*, 14 N. Y. 506, 67 Am. Dec. 186.

⁴³ *PORT OF MOBILE v. WATSON*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090; *WOLFF v. NEW ORLEANS*, 103 U. S. 358, 26 L. Ed. 395; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

⁴⁴ *City of Memphis v. U. S.*, 97 U. S. 293, 24 L. Ed. 920; *SHAPLEIGH v. SAN ANGELO*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310.

⁴⁵ *Board of Liquidators of City Debts v. Municipality*, 6 La. Ann. 21; *KELLY v. MINNEAPOLIS*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

⁴⁶ *VON HOFFMAN v. QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *City of Galena v. Amy*, 5 Wall. (U. S.) 705, 18 L. Ed. 560; *WOLFF v. NEW ORLEANS*, 103 U. S. 358, 26 L. Ed. 395.

⁴⁷ *City of St. Louis v. Shelds*, 52 Mo. 351.

⁴⁸ *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Brick Presbyterian Church Corp. v. Mayor*, 5 Cow. (N. Y.) 538; *Rittenhouse v. Mayor*, 25 Md. 336; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

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a contract would be void as against public policy, and therefore not protected by the federal Constitution.⁴⁹

EXPENSES.

155. Municipal expenses include all such items as are incidental to the proper exercise of corporate functions in administering the government of the municipality, and, if within the scope of the municipal powers, within the discretion of the governing body.

The details of administration in a municipality are so varied and numerous as to render classification or special regulation impossible. They are, however, generally committed to the discretion of the municipal council,⁵⁰ but in some instances that of special officers.⁵¹ For example, it has been held that a stenographer's fees for reporting, under the direction of the city attorney, the trial of a case against a police officer, was a proper item of municipal expense, though the city was not a party to the suit, since such matters must be left to the discretion of the city attorney, and he was acting within the proper scope of his authority.⁵² But the discretion vested in the council will not validate a claim for items of expenditure obviously not municipal, such as giving banquets,⁵³ providing

⁴⁹ *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481; *Brewster v. Hough*, 10 N. H. 143; *LYNN v. POLK*, 8 Lea (Tenn.) 121; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *Barnard v. Colchester*, 31 Conn. 410; *Wilmington & W. R. Co. v. Ives*, 64 N. C. 226; *Mott v. Railroad Co.*, 30 Pa. 9, 72 Am. Dec. 664.

⁵⁰ 1 Dill. Mun. Corp. § 94; *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118; *White v. Mayor*, 119 Ala. 476, 23 S. 999. Ante, § 71.

⁵¹ Ante, § 65.

⁵² *City of Chicago v. Williams*, 80 Ill. App. 33.

⁵³ *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Commonwealth v. Gingrich*, 21 Pa. Super. Ct. 286.

entertainment for guests,⁵⁴ buying military uniforms,⁵⁵ expenses of delegates to a municipal convention,⁵⁶ and the like.⁵⁷

BUDGET.

156. A classified statement of annual appropriation of municipal revenues, commonly called a budget, is required in many states, as the measure of lawful municipal expenditures during the year.

The object of this budget, obviously, is to ensure an orderly, systematic, and economical administration of municipal affairs, and the executive officers of the municipality are required to conform their operations to this budget, and limit their expenditures to the sum appropriated to the various departments

⁵⁴ *Black v. Detroit*, 119 Mich. 571, 78 N. W. 660.

⁵⁵ *Claffin v. Hopkinton*, 4 Gray (Mass.) 502.

⁵⁶ *Waters v. Bonvouloir*, 172 Mass. 286, 52 N. E. 500.

⁵⁷ *City of Tyler v. L. L. Jester & Co.* (Tex.) 74 S. W. 359; *State ex rel. Crowe v. St. Louis*, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; *In re Town of Eastchester*, 53 Hun, 181, 6 N. Y. Supp. 120; *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *The Liberty Bell*, 23 Fed. 843; *City of New London v. Brainard*, 22 Conn. 556; *HODGES v. BUFFALO*, 2 Denio (N. Y.) 110; *Greenough v. Wakefield*, 127 Mass. 275.

Where a city council, without authority, authorized the payment of a claim of a member for expenditures made by him in company with others on a trip to various cities investigating municipal affairs in pursuance of an ordinance, the city comptroller properly refused to approve a warrant drawn in payment of such claim. *James v. Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957.

But charges for labor and material furnished in the building of a city jail, services in guarding quarantined patients, publishing notice and printing ballots of election, feeding impounded stock, boarding city prisoners, insurance on city buildings, services in making assessment rolls, postage and stationery for officers, city printing and necessary expenses of the city clerk, are held valid, though the city had exceeded the limit of its indebtedness, as such were necessarily expenses incurred in maintaining its existence. *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189.

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or kinds of municipal work.⁵⁸ But the courts of the various states express diverse views as to the object of such statutes and the municipal power thereunder. In Illinois⁵⁹ and Colorado⁶⁰ municipalities are held to be limited in expenditure to the budget appropriations. In Connecticut⁶¹ it is held that the statute is intended for protection of the city against its officers and that the council may incur expenditures not provided for by the budget; and in Nebraska⁶² the budget limit has been held not to include money authorized to be borrowed for specific purpose on sanction of the legal voters. It has also been held that unwarranted expenditures for municipal objects may be ratified by the council, and a claim therefor be thus validated.⁶³

⁵⁸ *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. 295; *State ex rel Barber Asphalt Pav. Co. v. New Orleans*, 40 La. Ann. 299, 3 South. 584. The amount placed on the budget for the annual expenses of a municipal corporation when collected by taxes levied therefor may be applied to the purposes specified in the budget. *Parish Board of School Directors v. Shreveport*, 47 La. Ann. 1310, 17 South. 804. See *Badger v. New Orleans*, 49 La. Ann. 804, 21 South. 870, 37 L. R. A. 540.

⁵⁹ *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781.

⁶⁰ *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736.

⁶¹ *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666.

⁶² *State v. Martin*, 27 Neb. 441, 43 N. W. 244.

⁶³ *Barrett v. Mobile*, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 100; *MILLS v. GLEASON*, 11 Wis. 470, 78 Am. Dec. 721; *City of St. Louis, to Use of Creamer, v. Clemens*, 52 Mo. 133; *Burrill v. Boston*, 2 Cliff. 590, Fed. Cas. No. 2,198; *Kunkle v. Franklin*, 13 Minn. 119 (Gil. 119), 97 Am. Dec. 226; *Bolles v. Brimfield*, 120 U. S. 759, 7 S. Ct. 736, 30 L. Ed. 786.

But where it is in excess of the constitutional limitation it cannot be ratified. *Balch v. Beach* (Wis.) 95 N. W. 132.

See, also, *McGillivray v. District*, 112 Wis. 354, 88 N. W. 310, 10 L. R. A. 100, 88 Am. St. Rep. 969.

CLAIMS.

157. Claims against a municipality ex contractu do not become actionable until after due and regular presentation and demand for payment, and refusal by the proper officer.

While there is lack of entire uniformity in the decisions of the various states with regard to the enforcement of contractual claims against a municipality, the general doctrine based upon the nature of such claim and the necessities of municipal administration is as above stated.⁶⁴ In the management of municipal affairs some officer is intrusted with the duty of auditing claims; and when the claims are approved, or an accord has been reached, warrants are drawn for payment upon the municipal treasury. After such warrant has been presented and payment refused, the claimant has a right of action thereon;⁶⁵ but the warrant is not conclusive upon either party.⁶⁶ The municipality may defend against the warrant upon the ground that the claim was ultra vires, fraudulent, or unfounded;⁶⁷ and the claimant, at any time before assigning or receiving payment of the warrant, may waive this acknowledgment of indebtedness and sue the municipality upon his

⁶⁴ *Burdick v. Richmond*, 16 R. I. 502, 17 Atl. 917; *Trustees v. White*, 48 Ohio St. 577, 29 N. E. 47; *Jones v. Albany*, 62 Hun, 353, 17 N. Y. Supp. 232; *Bass Foundry & Machine Works v. Board*, 115 Ind. 234, 17 N. E. 593.

⁶⁵ *City of Pekin v. Reynolds*, 31 Ill. 529, 28 Am. Dec. 244; *Varner v. Nobleborough*, 2 Me. 126, 11 Am. Dec. 48; *Saunders v. Fitzgerald*, 113 Ga. 619, 38 S. E. 978.

⁶⁶ *Allen v. Lafayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *Taft v. Pittsford*, 28 Vt. 286; *Varner v. Nobleborough*, *supra*.

⁶⁷ *Trowbridge v. Schmidt*, 82 Miss. 475, 34 South. 84; *CITY OF NASHVILLE v. RAY*, 19 Wall. (U. S.) 468, 22 L. Ed. 164; *Cheaney v. Brookfield*, 60 Mo. 53; *Salamanca Tp. v. Bank*, 22 Kan. 696; *First Nat. Bank v. Board*, 106 N. Y. 488, 13 N. E. 439; *CLARK v. DES MOINES*, 19 Iowa, 199, 87 Am. Dec. 423.

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original claim.⁶⁸ After payment of the warrant neither can have any action upon the subject-matter, except on grounds of equity which will warrant the unsettling of a liquidated claim.⁶⁹ The creditor having a warrant upon a special fund may demand payment out of the same, and if payment is refused he may enforce it by mandamus.⁷⁰

⁶⁸ *Crawford Co. v. Wilson*, 7 Ark. 214; *Dalrymple v. Whiteham*, 26 Vt. 347; *Dyer v. Covington Tp.*, 19 Pa. 200; *Varnum v. Nobleborough*, *supra*; *Allen v. Lafayette*, *supra*.

⁶⁹ *Sweet v. Carver Co.*, 16 Minn. 106 (Gil. 96); *Crawford Co. v. Wilson*, *supra*; *Webster v. Douglas Co.*, 102 Wis. 181, 77 N. W. 72 Am. St. Rep. 870.

⁷⁰ *Ray v. Wilson*, 29 Fla. 342, 10 South. 613, 14 L. R. A. 773; *People v. Gandy*, 12 Neb. 232, 11 N. W. 296; *People v. Wendell*, 71 Neb. 171; *Bush v. Gelsy*, 16 Or. 355, 19 Pac. 123; *German-American Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115 (in which it was held that a city is liable in damages to a holder of its warrants, payable out of a special assessment to be collected by the city, for the payment of warrants of subsequent issue and number before those of the holder); *City of Greencastle v. Allen*, 43 Ind. 347; *Voorhies v. Littleton*, 70 Tex. 331, 7 S. W. 679.

Where warrants are drawn against a city with an express provision that they shall be payable from a special fund to be raised by levy on certain lands, the holder must resort to mandamus to compel such levy, and cannot compel the city to pay the same out of the general funds, unless the levy has been made, and the money to pay the warrants is in the city treasury. *Turner v. Guthrie* (Okla.) 73 Pac. 283.

But the holder of warrants need not resort to mandamus to compel the treasurer to act, an action at law against the city being maintainable. *First Nat. Bank v. Arthur*, 10 Colo. App. 283, 50 Pac. 738; *Raton Water Works Co. v. Raton*, 9 N. M. 70, 49 Pac. 898; *Smith v. Baker City*, 31 Or. 249, 49 Pac. 973; *Travelers' Ins. Co. v. Denver*, 11 Colo. 434, 18 Pac. 556.

APPROPRIATION.

158. Appropriation, being the authoritative application by the council of municipal revenues to a distinct object or definite purpose, fixes the rule of action governing all officers in the handling and disbursement of the municipal revenues.

The classification of municipal funds with reference to the various departments of municipal business, being essentially for orderly administration, the legislative act of appropriation operates to devote the municipal funds to the specific objects, and to require of all officers handling municipal funds a strict compliance with the municipal ordinance.⁷¹ No discretion is left to the financial officer in disbursing the municipal revenues;⁷² the funds appropriated to a specific object must be applied solely to it.⁷³ The duties of the disbursing officer are purely ministerial, and his only safety is in obedience to the appropriation.⁷⁴ It has been held competent for the council or for the legislature to amend the ordinance of appropriation and divert the funds to other municipal objects when this does not impair a contract obligation.⁷⁵ Whatever be the statute or ordinance of appropriation, the disbursing officer must act in obedience to it.⁷⁶

⁷¹ *Baker v. Seattle*, 2 Wash. St. 576, 27 Pac. 462.

⁷² *First Nat. Bank v. Arthur*, 10 Colo. App. 283, 50 Pac. 738; *State v. Cook*, 43 Neb. 318, 61 N. W. 693; *Flick v. Harpham*, 13 Pa. Co. Ct. R. 648; *City of Bonham v. Taylor*, 81 Tex. 59, 16 S. W. 555; *Wilson v. Neal*, 23 Fed. 129.

⁷³ *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151; *Priet v. Reis*, 93 Cal. 85, 28 Pac. 798.

⁷⁴ *Nolan Co. v. Simpson*, 74 Tex. 218, 11 S. W. 1098; *State v. Corn-ing*, 44 Kan. 442, 24 Pac. 966.

⁷⁵ *Creighton v. San Francisco*, 42 Cal. 446; *Crittenden County Court v. Shanks*, 88 Ky. 475, 11 S. W. 468; *Sangamon Co. v. Springfield*, 63 Ill. 66; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

⁷⁶ *City of East St. Louis v. Flannigen*, 34 Ill. App. 596; *Dorsey Co. v. Whitehead*, 47 Ark. 205, 1 S. W. 97.

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CHAPTER XVIII.**TAXATION.**

159. Taxation, Source of Power.
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171. Assessment and Collection.
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TAXATION, SOURCE OF POWER.

159. Taxation is an attribute of sovereignty. The power is not an essential function of a municipal corporation, but may be delegated to it by the state, either expressly or by necessary implication.

Government implies expenditure of money. Expenditures demand revenue. Revenue requires taxation. Taxation is inherent in the state, as an essential attribute of sovereignty.¹ It is the method whereby those receiving the protection of government are compelled to contribute to its support. It is primarily a legislative function, and all taxation is based upon legislative authority;² but the legislature may delegate this

¹ State v. Bristol, 109 Tenn. 315, 70 S. W. 1031; McCULLOCH v. MARYLAND, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939.

² The only warrant for the imposition of a tax or burden upon the citizen or his property without his consent must be found in some

power to local subdivisions of the state as governmental agencies,³ and thus empower them to perform this sovereign function. Few, if any, American municipalities exist without this power, but it is not inherent in a municipality as an essential attribute of incorporation.⁴ The state might incorporate a

positive law, and it cannot be enforced unless imposed in the manner authorized by statute. *Queens County Water Co. v. Monroe*, 83 App. Div. 105, 82 N. Y. Supp. 610.

The power of taxation is purely legislative, and the courts cannot inquire into the necessity of a tax levy made by a municipality within the limits prescribed by the Constitution. *Mayfield Woolen Mills v. Mayfield*, 22 Ky. Law Rep. 1676, 61 S. W. 43.

The legislative power is supreme in the selection of objects for taxation, determining the amount of taxes to be levied thereon and the purposes thereof, subject to the constitutional limitation that taxes can be imposed only for public purposes, and that taxation must be uniform. *State v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

See *Cooley*, Const. Lim. (6th Ed.) 587.

³ *Smith v. Howell*, 60 N. J. Law, 384, 38 Atl. 180; *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700; *Carter v. Wade*, 59 N. J. Law, 119, 35 Atl. 649; *Grunewald v. Cedar Rapids*, 118 Iowa, 222, 91 N. W. 1059; *State v. Des Moines*, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157; *Edgerton v. Water Co.*, 129 N. C. 93, 35 S. E. 243, 48 L. R. A. 444; *Wells v. Savannah*, 107 Ga. 1, 32 S. E. 669.

A state, having power to tax property for state purposes, may confer on one of its municipalities the power to tax the same property for local purposes. *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823; *HOPE v. DEADERICK*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *LARAMIE COUNTY v. ALBANY COUNTY*, 92 U. S. 307, 23 L. Ed. 552; *Rogers v. Burlington*, 3 Wall. (U. S.) 663, 18 L. Ed. 79; *Langhorne v. Robinson*, 20 Grat. (Va.) 661; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Dally v. Swope*, 47 Miss. 367; *Whiting v. West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750, note.

But the power of taxation may not be delegated to any special committee. *Keeler v. Westgate*, 10 Pa. Dist. R. 240.

⁴ *Cooley*, Tax'n (2d Ed.) 464; *Town of Drummer v. Cox*, 165 Ill. 648, 46 N. E. 716; *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *State ex rel. Aull v. Shortridge*, 56 Mo. 126; *State v. Maysville*,

municipality, and supply it with revenue out of its own treasury to meet the expenditures necessary for the performance of its municipal functions. But the rule is otherwise in America, and the almost universal custom is to confer upon a municipality the power of taxation. This may be granted in express terms, or it may be implied as necessary for the exercise of the powers expressly granted.⁵ Thus, if a municipality is expressly authorized to borrow money, the power to levy taxes to raise revenue to meet the obligation is necessarily implied.⁶ The exercise of this power by municipalities in America is in strict accordance with the Anglo-Saxon instinct of home rule, and the genius of our free institutions.

LEGISLATIVE CONTROL.

160. The power of municipal taxation is subject to the sovereign will, and may be granted, enlarged, abridged, or revoked when and as the legislature shall deem best.

Since taxation is a sovereign power, a municipality, being a dependent and derivative body, cannot hold such power in

12 S. C. 76; *Lott v. Ross*, 38 Ala. 156; *Vance v. Little Rock*, 30 Ark. 435; *Green v. Ward*, 82 Va. 324; *CLARK v. DAVENPORT*, 14 Iowa. 494; *Taylor v. Donner*, 31 Cal. 480; *Commissioners of Town of Asheville v. Means*, 29 N. C. 406; *Burnes v. Atchison*, 2 Kan. 454; *In re Second Ave. M. E. Church*, 66 N. Y. 395; *City of Fairfield v. Ratcliff*, 20 Iowa, 396; *Henderson v. Baltimore*, 8 Md. 352. But see *UNITED STATES v. NEW ORLEANS*, 98 U. S. 381, 25 L. Ed. 225.

⁵ *State v. Bristol*, 109 Tenn. 315, 70 S. W. 1031; *Howell v. Buffalo*, 15 N. Y. 512; *MAYS v. CINCINNATI*, 1 Ohio St. 268; *City of Philadelphia v. Flanigen*, 47 Pa. 21; *Commissioners of Town of Asheville v. Means*, 29 N. C. 406; *Ham v. Sawyer*, 38 Me. 37.

⁶ *Slocomb v. Fayetteville*, 125 N. C. 362, 34 S. E. 436; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *UNITED STATES v. NEW ORLEANS*, 98 U. S. 381, 25 L. Ed. 225; *Wright v. Chicago*, 20 Ill. 252; *Mayor, etc., of City of Annapolis v. Harword*, 32 Md. 471, 3 Am. Rep. 161.

perpetuity.⁷ It is entirely subject to the legislative control. The legislature, at the creation of the corporation, may grant or withhold this power, as to it shall seem best. It may give a small or large measure of the power; and after the original grant it may enlarge, curtail, or wholly revoke it, subject only to the vested rights of creditors.⁸ The municipality is the agent only. The state is the principal; and it is for the principal, not for the agent, to determine the nature, number, and extent of the powers to be exercised by the agent.⁹

PUBLIC PURPOSE ONLY.

161. Taxes may be levied by a municipality for public purposes only.

The legislature is the exclusive judge as to the rate of taxation to be imposed upon the state by itself;¹⁰ and such measure of taxing power as it possesses it may confer upon a mu-

⁷ *City of New Orleans v. Water Works Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; *Williamson v. New Jersey*, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

⁸ *Broughton v. Pensacola*, 92 U. S. 266, 23 L. Ed. 896; *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. Ed. 296; *VON HOFFMAN v. QUINCY*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *UNITED STATES v. NEW ORLEANS*, 103 U. S. 358, 26 L. Ed. 395; *Commonwealth v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530.

⁹ *City of St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 89; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Fitch v. Pinckard*, 4 Scam. (Ill.) 78; *State v. Bristol*, 109 Tenn. 315, 70 S. W. 1031.

¹⁰ *McCULLOCH v. MARYLAND*, 4 Wheat. (U. S.) 818, 428-430, 4 L. Ed. 579; *Weston v. Charleston*, 2 Pet. (U. S.) 449, 7 L. Ed. 481; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 561, 7 L. Ed. 939; *Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521; *SHARPLESS v. PHILADELPHIA*, 21 Pa. 147, 59 Am. Dec. 759; *Herrick v. Randolph*, 13 Vt. 525; *PEOPLE v. BROOKLYN*, 4 N. Y. 419, 55 Am. Dec. 266; *Wingate v. Sluder*, 51 N. C. 552.

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nicipality.¹¹ The only limit, therefore, as to the amount of municipal taxes to be raised for municipal purposes must be found in the civic conscience and sense of responsibility of the governing body of the municipality. The citizens have entrusted the governing bodies with this power, and they may exercise it to the full legislative limit, provided, always, that they employ it only for public purposes.¹² If the power is perverted to private purposes, it is no longer taxation; it is extortion.¹³ And it matters not whether the malversation is in small or in large sums; it is an abuse of sovereign power, amounting to robbery under the forms of law. The touchstone of all taxation, municipal and state, in our country, is not, then, the rate of the levy, but the object of the appropriation.¹⁴

¹¹ *Baldwin v. Montgomery*, 53 Ala. 437; *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Harrison v. Vicksburg*, 3 Smedes & M. (Miss.) 581, 41 Am. Dec. 633; *City of Logansport v. Seybold*, 59 Ind. 225.

¹² *United States v. Capdevielle*, 118 Fed. 809, 55 C. C. A. 421; *Baltimore & O. S. W. R. Co. v. People*, 200 Ill. 623, 66 N. E. 246; *Eltling v. Hickman*, 172 Mo. 237, 72 S. W. 700; *Wisconsin Industrial School v. Clark County*, 103 Wis. 651, 79 N. W. 422; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Wilkinson v. Cheatham*, 43 Ga. 258; *Brewer Brick Co. v. Inhabitants of Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Curtis' Adm'r v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *CITY OF LOWELL v. BOSTON*, 111 Mass. 454, 15 Am. Rep. 39; *People v. Austin*, 47 Cal. 353.

The power of the legislature to levy or to authorize the levy of a tax, and to create or to authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose. *Dodge v. Mission Tp.*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242; *Sutherland-Innes Co. v. Evart*, 86 Fed. 597, 30 C. C. A. 305.

See *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

¹³ *In re Washington Ave.*, 60 Pa. 352, 8 Am. Rep. 255; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Morford v. Unger*, 8 Iowa, 82; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *SHARPLESS v. PHILADELPHIA*, 21 Pa. 147, 59 Am. Dec. 759.

¹⁴ *Hitchcock v. St. Louis*, 49 Mo. 484; *Reddall v. Bryan*, 14 Md.

So long as the public is to be the beneficiary, it is lawful taxation; but when it is perverted to personal uses it is lawless confiscation; and this is true whether it be done openly, and in defiance of the public right (which is rare), or secretly, under plausible pretext of public benefit (which has not been uncommon in American municipalities).

JUDICIAL QUESTION.

162. Whether the purpose is public or private is for ultimate decision by the courts.

This wholesome rule of law is the sure safeguard of citizens against lawless oppression. If the legislature or common council having unlimited power to levy taxes for public purposes, had also unlimited power to determine what was a public use, there would be no protection for private property in state or city.¹⁵ Taxes could be levied and appropriated ad libitum, and the citizens might be at the mercy of faithless representatives. Such unbridled power would be repugnant to the American ideal of the supremacy of law. It would set at naught our system of checks and balances in government, and nullify our Bill of Rights.

Opinion of Common Council.

The facts of any case being conceded or proven, it is then for the courts to declare the law; and, while the common

444, 74 Am. Dec. 550; *In re Central Park Com'rs*, 63 Barb. (N. Y.) 282; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99.

¹⁵ *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Tyler v. Beacher*, 44 Vt. 651, 8 Am. Rep. 398; *People v. Flagg*, 46 N. Y. 401; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Curtis' Adm'r v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Crowell v. Hopkinton*, 45 N. H. 9; *Morford v. Unger*, 8 Iowa, 82; *SHARPLESS v. PHILADELPHIA*, *supra*.

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council of a municipality are empowered in the first instance to express their view of the nature of the tax, their opinion is not conclusive, but may be subjected to the ultimate test of judicial determination.¹⁶ If it be doubtful whether the purpose is public or private, if the courts cannot plainly see that the appropriation is a perversion of public power to personal uses, they will resolve the doubt in favor of the legislative power, and sustain the facts.¹⁷ But if it is obvious that the taxation is intended not for public, but for private, use, no sense of respect for the co-ordinate branch of government will deter them from declaring such legislation unconstitutional, and such taxation null and void.¹⁸ It has accordingly been held that public moneys in a town treasury cannot be distributed among "the inhabitants of the town according to families";¹⁹ and that the credit of a town cannot be loaned to a manufacturing firm to induce the location of a manufacturing plant in

¹⁶ *Ryerson v. Utley*, 16 Mich. 269; *Booth v. Woodbury*, 32 Conn. 118; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Grim v. Weissenborn*, 57 Pa. 433, 98 Am. Dec. 237; *Yale University v. New Haven*, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

The decision of the question whether a tax or a public debt is for a public or private purpose is not legislative, but a judicial function. A legislature cannot make a private purpose a public purpose or draw to itself or create the power to authorize a tax or a debt for such a purpose. *Dodge v. Mission Tp.*, 107 Fed. 827, 46 C. C. A. 54 L. R. A. 242.

¹⁷ *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Langfield v. Vernon*, 41 N. Y. 123; *Tyson v. School Directors*, 51 Pa. 189; *Ferguson v. Landram*, 5 Bush (Ky.) 230, 96 Am. Dec. 350; *Free v. Hastings*, 10 Allen (Mass.) 570.

¹⁸ *Dodge v. Mission Tp.*, *supra*; *SHARPLESS v. PHILADELPHIA*, 21 Pa. 147, 59 Am. Dec. 759; *Hanson v. Vernon*, 27 Iowa, 28, 11 Am. Rep. 215; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Crow v. Rowse*, 43 Mo. 479; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *People v. Austin*, 47 Cal. 360; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455.

¹⁹ *Hooper v. Emery*, 14 Me. 379.

town; ²⁰ also that a tax on a foreign insurance company for the benefit of disabled firemen was void.²¹

On the same principle the proposed issuance of \$20,000,000 worth of bonds by the city of Boston to raise money to loan to lot owners for the purpose of rebuilding in the burnt district in the city after the great fire of 1872 was declared to be null and void.²² The same ruling had been previously made upon a similar act of the legislature of South Carolina in regard to the city of Charleston after the fire of 1866.²³ And an act providing for a tax to defray the expenses incurred in defending unsuccessful prosecutions against city officers for official misconduct was held invalid, as being an attempted exercise of the police power for a private purpose.²⁴ And so an act providing for the appropriation of a sum for the treatment of habitual drunkards in private institutions at the expense of the county was held unconstitutional, as being the imposition of a tax for private purposes.²⁵

²⁰ *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Osborne v. Adams County*, 109 U. S. 1, 3 Sup. Ct. 150, 27 L. Ed. 835; *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216; *Attorney General v. Eau Claire*, 37 Wis. 400.

²¹ *Philadelphia Ass'n for Relief of Disabled Firemen v. Wood*, 39 Pa. 73.

But an act requiring insurance companies to pay an annual fee to the fire department of Montgomery to enable it to reward superior skill and exertion in its members and provide for sick or disabled members or their families was held not unconstitutional as imposing a tax for private purposes, even though the fire department be the direct recipient of it. *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

²² *LOWELL v. BOSTON*, 111 Mass. 463, 15 Am. Rep. 39.

²³ *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6.

²⁴ *In re Jensen*, 44 App. Div. 509, 60 N. Y. Supp. 933.

²⁵ *State v. Froehlich*, 118 Wis. 129, 94 N. W. 50, 61 L. R. A. 345.

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WHAT ARE PUBLIC PURPOSES.

163. A general concurrence of judicial opinion includes as public purposes of municipalities

- 1. The administration of justice.**
- 2. The preservation of peace and order.**
- 3. The protection of property.**
- 4. The facilitation of locomotion and transportation.**
- 5. The preservation of the public health.**
- 6. The support of public education.**
- 7. The promotion of public comfort.**
- 8. The care of the helpless.**
- 9. The reward of civic fidelity and heroism.**

The question of what is a public and what a private purpose has been repeatedly before the supreme courts of the various states in divers forms, and there is apparent inconsistency in the decisions. This has resulted in some states from fear of the Constitution to forbid the legislature authorizing municipalities to loan credit to and exempt from taxation industrial enterprises of various kinds. But where there is express constitutional provision declaring and enforcing the rule of uniform and equal taxation, public purposes only have been generally, if not universally, recognized and sustained as the basis of the power; and in declaring what are public purposes the courts have not been inclined to confine their view to a narrow view, but have generally adopted and followed the opinion of Judge Black in the celebrated case of *Sharpley v. City of Philadelphia*.²⁶

The substance of this decision is thus felicitously stated by the author of repute:²⁷ "Taxes may be imposed for roads of various kinds, canals, and bridges, that there may be facilities for transportation of freight and for travel; for public schools and colleges, that the people may be educated; for public libraries, that their means of improvement may be increased; for the poor, the dumb, the blind, the insane, lest they suffer

²⁶ 21 Pa. 147, 59 Am. Dec. 759.

²⁷ Burroughs, Tax'n, §

want; for the police of the state, in regulations for the preservation of health or the detection of crime; for courts of law, that individual rights may be protected and enforced, and that crime, when detected, may receive its fitting punishment; for the preservation of peace and the protection of the country from foreign enemies; to aid, encourage, and stimulate commerce, domestic and foreign, by the establishment of mints, postal system, and maintaining navies to keep open the highway of nations; to encourage citizens in the defense of their country by suitable rewards and mementos for past services in times of war, or by bounties for enlistment for future services; and for the promotion of the arts and sciences. For all these matters taxes may be imposed. The purpose is public. The object is governmental. The money raised and property purchased is held by the agents of the state for the state. The object is so to regulate the state that all its citizens may enjoy their lives, liberty, and property, and pursue their happiness according to the dictates of their own reason."

In many cases taxation has been upheld which would result in private benefit because the purpose of the taxation was public, and in others taxation which would confer public benefit has been annulled because the obvious purpose of the levy was private. The rule governing the courts in all these cases seems to be that incidental benefits are not to decide the fate of a tax levy, but the obvious purpose of the taxation is to form the basis of the decision.²⁸

²⁸ *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Weeks v. Milwaukee*, 10 Wis. 242; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Booth v. Woodbury*, 32 Conn. 118; *Mills v. Charleton*, 29 Wis. 411, 9 Am. Rep. 578. Tax for construction of subway held valid, *PRINCE v. CROCKER*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; support of poor, *Louisville & N. R. Co. v. Pendleton County*, 96 Ky. 491, 29 S. W. 324; *Elizabeth Water Co. v. Wade*, 59 N. J. Law, 78, 35 Atl. 4; *Maydwell v. Louisville*, 25 Ky. Law Rep. 1062, 76 S. W. 1091, 63 L. R. A. 655.

A tax imposed for the purpose of aiding an exposition was held constitutional, as being for the promotion of the public welfare. *State v. Cornell*, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am.

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APPORTIONMENT OF TAXES.

164. The apportionment of the levy is an essential feature in the sovereign attribute of taxation, and may be exercised by the municipality as well as by the state.

Taxation is a burden to be borne for benefits conferred.²⁹ The general benefit accruing to citizens from good government calls for contributions from all in proportion to their ability to pay. This is usually determined by the value of their property which receives the protection of government. Special benefits, however, conferred by the state upon particular localities at extraordinary expense, ought not to be paid for by all the citizens of the state, but the expense thereof should in justice fall upon those who receive the benefits.³⁰ Municipalities, therefore, which receive special grants of power, enabling them to obtain particular advantages over the unincorporated portions of the state, are properly taxed with the extraordinary expense of conferring these benefits.³¹

St. Rep. 629. But see *Hayes v. Douglas County*, 92 Wis. 429, 65 N. W. 482, 51 L. R. A. 213, 53 Am. St. Rep. 926.

In Missouri, an act imposed a collateral succession tax to create a fund for maintaining free scholarships in the university, distributed throughout the state on competitive examination to applicants without means. It was held to be for purely private purposes, and void. *State ex rel. Garth v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653; *Same v. Rassieur*, Id. And so an act providing that the manufacturers of patent medicine should pay a license, which should be turned into a fund for maintaining free scholarships in the State University for students. *C. F. Simmons Medicine Co. v. Ziegenhein*, 145 Mo. 368, 47 S. W. 10.

²⁹ Montesquieu, *Spirit of Laws*, b. 12, c. 30; Marshall, C. J., in *Providence Bank v. Billings*, 4 Pet. (U. S.) 561, 7 L. Ed. 939; *Mills*, Pol. Econ. 370-372; 2 Bouv. Law Dict. tit. "Taxes."

³⁰ *Ruggles, J.*, in *People v. Brooklyn*, 4 N. Y. 419, 428, 55 Am. Dec. 266; *City of Bridgeport v. Railroad Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Hammitt v. Philadelphia*, 65 Pa. 148, 3 Am. Rep. 615; *Neenan v. Smith*, 50 Mo. 525.

³¹ *Gordon v. Cornes*, 47 N. Y. 608; *City of Philadelphia v. Field*,

Taxation and Apportionment Inseparable.

The power of taxing and the power of apportioning taxation are inseparable; the former, indeed, includes the latter, and the state may either itself make the apportionment of extraordinary expense for local benefit, or it may confer the power upon the public corporation of the locality.³² The latter method is commonly pursued, and thus municipalities are authorized to decide in what measure they will exercise the powers conferred upon them, and what amount of expense within legislative limits they will incur therefor.³³ All general improvements in a municipality are paid for out of the municipal treasury;³⁴ but in the municipality, just as in the state, inequalities of benefit in the improvements of divers localities call for unequal burdens of taxation. Those who receive special benefits in a municipality are therefore liable to special burdens of taxation, and the same power of apportionment existing in the state government is likewise recognized in municipal government.³⁵

58 Pa. 320; *Shaw v. Dennis*, 5 Gilman (Ill.) 405; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Brewster v. Syracuse*, 19 N. Y. 116.

³² *HOPE v. DEADERICK*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *PEOPLE v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *Battle v. Mobile*, 9 Ala. 234, 44 Am. Dec. 438; *Harrison v. Vicksburg*, 3 Smedes & M. (Miss.) 581, 41 Am. Dec. 633; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

³³ *People v. Flagg*, 46 N. Y. 401; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *City of Ottawa v. Spencer*, 40 Ill. 211; *Kansas City v. Baird*, 98 Mo. 215, 11 S. W. 562.

³⁴ *Taylor v. Chandler*, *supra*; *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428.

³⁵ *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *In re Washington Ave.*, 69 Pa. 352, 8 Am. Rep. 255; *Chamberlain v. Cleveland*, 34 Ohio St. 551.

Local Assessments.

This is the principle adopted and enforced in making local assessments for local improvements. If a particular street is to be graded, guttered, curbed, and paved, the expense of this special improvement should be borne by the lot owners upon that street.³⁶ So, also, of sidewalks, sewers, and drains for a particular locality;³⁷ and so, in general, wherever the municipality, in the exercise of its charter powers, incurs an extraordinary expense for the special benefit of a particular portion of the city, it may in the exercise of its power of apportionment impose upon that locality special taxes sufficient to pay the entire amount of this extraordinary expense, or such portion thereof as it may deem proper.³⁸ This general doctrine of the law, however, is subject to exception in some states wherein it has been held that the constitutional provision for equality and uniformity of taxation prevent such special assessment for local improvements.³⁹ The power to make local assessments exists only in those municipalities upon which it has been specially conferred.⁴⁰ It is not to be implied from the general

³⁶ *Hale v. Kenosha*, 29 Wis. 599; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *State v. Reis*, 38 Minn. 371, 38 N. W. 97; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *City of Lafayette v. Fowler*, 34 Ind. 140.

³⁷ *PALMER v. DANVILLE*, 154 Ill. 156, 38 N. E. 1067; *Wolf v. Philadelphia*, 105 Pa. 25; *Grunewald v. Cedar Rapids*, 118 Iowa. 222, 91 N. W. 1059; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479; *Wright v. Boston*, 9 Cush. (Mass.) 233.

³⁸ *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Illinois Central R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132; *City of Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611.

³⁹ *Taylor v. Chandler*, 9 Helsk. (Tenn.) 349, 24 Am. Rep. 306; *MAYOR OF MOBILE v. DARGAN*, 45 Ala. 310; *Stinson v. Smith*, 8 Minn. 366 (Gil. 326).

⁴⁰ *City of Fairfield v. Ratcliffe*, 20 Iowa, 396; *Mayor of Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161; *State v. Mayor*, 71 Wis.

power of taxation.⁴¹ In Tennessee the peculiar rule exists that abutters may be taxed for the cost of constructing sidewalks in front of their property, but not for curbing, guttering, and paving.⁴²

Mode of Apportionment.

The basic idea of local assessment is to impose burdens in proportion to benefits, and thus equalize taxes; but it is a trite saying that in taxing absolute equality is unattainable. The method generally pursued is to tax lots by the front foot.⁴³ A street or sewer assessment may be made for the whole street or a part thereof, even to a single block;⁴⁴ and different streets, it seems, may be included in the same assessment.⁴⁵

502, 37 N. W. 809; *Drake v. Phillips*, 40 Ill. 388; *Flewelling v. Proetzel*, 80 Tex. 191, 15 S. W. 1043; *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659; *McNamara v. Estes*, 22 Iowa, 246; *Reed v. Toledo*, 18 Ohio, 161; *Vance v. Little Rock*, 30 Ark. 435.

The only basis on which special taxation or special assessments can be sustained is that the property subject to assessment or taxation will be enhanced in value to the extent of the burden imposed. *City of Butte v. School Dist. (Mont.)* 74 Pac. 869.

⁴¹ *HITCHCOCK v. GALVESTON*, 96 U. S. 341, 24 L. Ed. 659; *First Presbyterian Church v. Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35; *Appeal of Powers*, 29 Mich. 504; *Sharp v. Speir*, 4 Hill (N. Y.) 76.

⁴² *Mayor of Franklin v. Maberry*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315; *Whyte v. Mayor*, 2 Swan (Tenn.) 369; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

⁴³ *Emery v. Gas Co.*, 28 Cal. 345; *Walsh v. Matthews*, 29 Cal. 123; *City of Cincinnati v. Wilder*, 6 Ohio Dec. 1046; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Maloy v. Marietta*, 11 Ohio St. 636; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230; *City of Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *Jersey City v. Howeth*, 30 N. J. Law, 521; 2 Dill. Mun. Corp. § 761.

⁴⁴ *Scoville v. Cleveland*, 1 Ohio St. 126; *Schenley v. Com.*, 36 Pa. 29, 78 Am. Dec. 359; *Brevoort v. Detroit*, 24 Mich. 322; *Parker v. Challiss*, 9 Kan. 155.

⁴⁵ *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871; *Mayall v. St. Paul*, 30 Minn. 294, 15 N. W. 170; *In re Walter*, 75 N. Y. 354. Contra, *Arnold v. Cambridge*, 106 Mass. 352.

A valid assessment can only be made in pursuance of the method prescribed by law.⁴⁶ Other rules in regard to local assessment have been hitherto considered in the chapter on Improvements.⁴⁷

SUBJECTS OF TAXATION.

165. The power of municipal taxation extends over all persons and property within municipal boundaries, and in certain instances also to adjacent realty.

Municipal taxation, being for municipal benefit, has for its subjects all goods and chattels, lands and tenements, within the municipal boundaries.⁴⁸ In general, the rate of assessment

⁴⁶ *Bower v. Bainbridge*, 116 Ga. 794, 43 S. E. 67; *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480, 32 L. Ed. 899; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Flewelling v. Proetzel*, 80 Tex. 191, 15 S. W. 1043; *State v. Mayor*, 49 N. J. Law, 311, 8 Atl. 295; *White v. Saginaw*, 67 Mich. 33, 34 N. W. 255; *Hawthorne v. East Portland*, 13 Or. 271, 10 Pac. 242; *Allen v. Galveston*, 51 Tex. 302; *City of Spokane Falls v. Browne*, 3 Wash. St. 84, 27 Pac. 1077; *LOTT v. ROSS*, 38 Ala. 156; *Churchman v. Indianapolis*, 110 Ind. 259, 11 N. E. 301; *City of Lowell v. Wheelock*, 11 Cush. (Mass.) 391.

⁴⁷ Ante, § 113.

⁴⁸ *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823; *In re Jones' Estate*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; *Hughes v. Carl*, 106 Ky. 533, 50 S. W. 852; *Louisville Trust Co. v. Louisville*, 42 S. W. 340; *City of Richmond v. Gibson* (Ky.) 46 S. W. 702; *Lamson Consol. Store Service Co. v. Boston*, 170 Mass. 354, 49 N. E. 635; *Buck v. Miller*, 147 Ind. 586, 47 N. E. 8, 47 L. R. A. 384, 62 Am. St. Rep. 436; *Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. 871; *People v. Barker*, 14 Misc. Rep. 382, 36 N. Y. Supp. 76.

The franchises of a corporation exercised and enjoyed by it in a city are property within the provisions of a city's charter requiring a tax on all property in it. *Southwestern Telegraph & Telephone Co. v. San Antonio* (Tex. Civ. App.) 73 S. W. 859.

In assessing property for taxation the dominant idea is that needful revenues shall be raised by levying a tax on property for valuation in such manner that every owner of property subject to tax-

upon all lands must be equal. Exception has been made to this general doctrine in a few cases with regard to agricultural

ation shall pay taxes in proportion to the value of the property owned. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

A city has no power to exempt taxable property within its limits from municipal taxation, and it can neither bind itself not to impose taxes on particular property nor to impose them only under given limitations. *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 South. 416, 63 Am. St. Rep. 202.

An agreement of a city to release property from taxation on consideration of permission to construct sewers across the land is void, as being beyond the power of the city. *Coit v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

A positive direction in the Constitution as to what property shall be exempt contains an implication against an exemption of any other property by the legislature. *State v. Armstrong*, 17 Utah, 166, 53 Pac. 981, 41 L. R. A. 407; *State v. Daniel*, 17 Wash. 111, 49 Pac. 243.

Carriger v. Morristown, 1 Lea (Tenn.) 118. A municipal corporation may not exempt any property in its boundaries from taxation, unless the legislature, in the exercise of constitutional authority so to do, expressly clothes it with the power to make exemption; and then the municipal action must be clearly within the power conferred. *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939; *City of South Bend v. University*, 69 Ind. 344; *State v. Parker*, 32 N. J. Law, 426; *Harvard College v. Boston*, 104 Mass. 470; *Biscoe v. Coulter*, 18 Ark. 423; *City of Newport v. Railway Co.*, 89 Ky. 29, 11 S. W. 954; *City of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

An exemption from taxation is never presumed, but must be clearly granted, *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660; and statutes exempting property from taxation must be strictly construed against those claiming the exemption, *People v. Association*, 160 Ill. 576, 43 N. E. 716.

But public property is not subject to general taxation. *People v. Assessors*, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; *McCULLOCH v. MARYLAND*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *City of Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273; *Green v. Hotelling*, 44 N. J. Law, 347; *Emery v. Gas Co.*, 28 Cal. 345; *Erie County v. Erie*, 113 Pa. 360, 6 Atl. 136; *Willard v. Pike*, 59 Vt. 202, 9 Atl. 907; *City of Reading v. Berks County*, 22 Pa. Super. Ct. 373; *Warren County v. Nall*, 78 Miss. 726, 29 South. 755; *City of Somerville v. Waltham*, 170 Mass.

lands,⁴⁹ for which a special rate has been provided; but in other cases this discrimination has been held to be unconstitutional.⁵⁰

Situs.

The law of actual situs prevails with regard to chattels.⁵¹ They are taxable by the municipality if they are usually kept or belong within its limits; and this, it seems, is so regardless of the domicile of the owner.⁵² But goods and chattels found temporarily within a municipality are not taxable therein; as where a vessel is at a city wharf taking on freight, her situs is not there, but at the home port, or domicile of the owner.⁵³

160, 48 N. E. 1092; *City of Newark v. Verona*, 59 N. J. Law, 94, 34 Atl. 1060. But see *City of Rochester v. Coe*, 25 App. Div. 300, 49 N. Y. Supp. 502.

⁴⁹ *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Com. v. Louisville & N. R. Co.* (Ky.) 46 S. W. 206; *Ryan v. Central City* (Ky.) 54 S. W. 2; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 633; *State v. Brown*, 53 N. J. Law, 162, 20 Atl. 772; *Land, Log & Lumber Co. v. Brown*, 73 Wis. 294, 40 N. W. 482, 8 L. R. A. 472; *Town of Dixon v. Mayes*, 72 Cal. 166, 13 Pac. 471; *McClay v. Lincoln*, 32 Neb. 412, 49 N. W. 282; *People v. Miller*, 84 App. Div. 168, 82 N. Y. Supp. 621.

⁵⁰ *Town of Latonia v. Hopkins* (Ky.) 47 S. W. 248; *Sharp's Ex'r v. Dunavan*, 17 B. Mon. (Ky.) 223; *City of Davenport v. Kauffman*, 34 Iowa, 184. See *Briggs v. Russellville*, 99 Ky. 515, 36 S. W. 558, 34 L. R. A. 198.

⁵¹ *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394; *Winston v. Salem*, 131 N. C. 404, 42 S. E. 889; *Ellis v. People*, 199 Ill. 548, 65 N. E. 428; *People v. Barker*, 84 App. Div. 469, 83 N. Y. Supp. 33. See 2 Dill. Mun. Corp. § 786.

Logs floating in a lake, so that at time of assessment they were in different townships, but were all intended to be taken to a certain sawmill, are assessable in the township where the mill is located. *Mitchell v. Lake Tp.*, 126 Mich. 367, 85 N. W. 865.

⁵² *Mills v. Thornton*, 26 Ill. 300, 79 Am. Dec. 377; *People v. Commissioners*, 23 N. Y. 224; *Carrier v. Gordon*, 21 Ohio St. 605; *City of Davenport v. Railroad Co.*, 12 Iowa, 539; *City Council of Augusta v. Dunbar*, 50 Ga. 387; *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. Ed. 192.

⁵³ *Johnson v. Merchants' Line*, 37 Fla. 499, 19 South. 640, 37 L. R.

The same principle will apply to railway cars and locomotives. They would be taxable at the company yard or roundhouse.⁵⁴ And so of other mobilia at the garage, dock, or stable where they are usually kept when not in use.⁵⁵

Notes, Bonds and Choses in Action—Situs of.

Much contention has arisen over the situs of stocks and bonds, franchises, notes, and other choses in action. The general rule with regard to such classes of personalty is that they are taxable at the owner's domicile, if he be a natural person.⁵⁶ But it has been held that where the owner, a nonresident, habitually leaves such property on deposit in the hands of an

A. 518; *City of Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *Morgan v. Parham*, 18 Wall. (U. S.) 471, 21 L. Ed. 308; *City of St. Joseph ex rel. Hannibal & St. J. R. Co. v. Saville*, 39 Mo. 460; *Perry v. Torrence*, 8 Ohio, 521, 32 Am. Dec. 725.

⁵⁴ *Chicago, B. & Q. R. Co. v. Hitchcock Co.*, 40 Neb. 781, 59 N. W. 358; *Philadelphia, W. & B. R. Co. v. Tax Ct.*, 50 Md. 397; *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Coe v. Railroad Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, 17 L. Ed. 886.

The value of the rolling stock of a corporation is capital employed within the state, unless such stock is used exclusively outside the state. *People v. Knight*, 173 N. Y. 255, 65 N. E. 1102; *Winton Coal Co. v. Commissioners* (Pa. Com. Pl.) 1 Lack. Leg. N. 195.

⁵⁵ *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. Ed. 192; *City of Sacramento v. Stage Co.*, 12 Cal. 134.

⁵⁶ *Corry v. Baltimore*, 96 Md. 310, 53 Atl. 942; *City of Marquette v. Land Co.* (Mich.) 92 N. W. 934; *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696; *In re Fair's Estate*, 128 Cal. 607, 61 Pac. 184. A deposit in a bank is a debt due the depositor, and its situs for the purposes of taxation is in the state of the depositor's domicile. *Pyle v. Brennehan*, 122 Fed. 787, 60 C. C. A. 409; *Clason v. New Orleans*, 46 La. Ann. 1, 14 South. 306; *Pacific Coast Sav. Soc. v. San Francisco*, 133 Cal. 14, 65 Pac. 16. In *People v. Knight*, 173 N. Y. 255, 65 N. E. 1102, it was held that where a domestic railroad owns the stock of a domestic transportation company which employs its capital outside the state, such stock constitutes no part of the railroad company's capital stock. Where money belonging to an estate was deposited in the city where one of three executors resided, one of the others being a nonresident, it was subject to taxation in such

agent for management, it is taxable at the agent's domicile;⁵⁷ and in case of corporations, whether domestic or foreign, its local franchises are taxable where they are used;⁵⁸ and its

city. *People v. Feltner*, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698.

The capital stock of a corporation is subject to taxation only in the state of its domicile. *Foster-Cherry Commission Co. v. Caskey*, 66 Kan. 600, 72 Pac. 268. Capital invested by a nonresident of the state in a seat in the New York Stock Exchange is property taxable in the state. In *re Glendinning's Estate*, 171 N. Y. 684, 64 N. E. 1121; *People v. Commissioners*, 39 Misc. Rep. 282, 79 N. Y. Supp. 485. See *People v. Feltner*, 77 App. Div. 189, 78 N. Y. Supp. 1017. *Contra*, *Reat v. People*, 201 Ill. 469, 66 N. E. 242; *Lee v. Dawson*, 8 Ohio Cir. Ct. R. 365.

The sovereign power which gives the shares of corporations their being can also give them situs within its territory for the purposes of taxation. *State v. Insurance Co.*, 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138; *Dykes v. Mortgage Co.* (judgment) 2 Kan. App. 217, 43 Pac. 268. See *Tappan v. Bank*, 19 Wall. (U. S.) 490, 22 L. Ed. 189; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 300, 21 L. Ed. 179; *Sturges v. Carter*, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; *City of Davenport v. Railroad Co.*, 12 Iowa, 539; *Collins v. Miller*, 43 Ga. 336; *Johnson v. Oregon City*, 3 Or. 13; *Hunter v. Supervisors*, 33 Iowa, 376, 11 Am. Rep. 132; *Cornwall v. Todd*, 38 Conn. 443; *Mead v. Roxboro*, 11 Cush. (Mass.) 362; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 538.

⁵⁷ *People v. Wells*, 41 Misc. Rep. 144, 83 N. Y. Supp. 936; *Northwestern Lumber Co. v. Chehalis Co.*, 25 Wash. 95, 64 Pac. 909, 34 L. R. A. 212, 87 Am. St. Rep. 747; *Catlin v. Hull*, 21 Vt. 152; *People v. Ogdensburgh*, 48 N. Y. 390; *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107; *State, on Petition of Taylor, v. County Court*, 47 Mo. 594; *Tazewell County Sup'rs v. Davenport*, 40 Ill. 197; *South Nashville St. Ry. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

Money or property held by an ancillary administrator is subject to taxation in the state granting such administration, where taxes are not paid on it at the principal place of administration. *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482.

⁵⁸ *Postal Tel. Cable Co. v. Norfolk (Va.)* 43 S. E. 207; *London & San Francisco Bank v. Block (C. C.)* 117 Fed. 900; *Rocheblave Market Co. v. New Orleans*, 110 La. 529, 34 South. 665; *City of Detroit v. Donovan*, 127 Mich. 604, 86 N. W. 1032; *Billingshurst v. Spink Co.*,

notes and other choses in action at the place where they are usually kept.⁵⁹

Adjacent Lands.

The power of the state is recognized in apportioning taxation for local improvements to include in the taxation district with a municipality adjoining lands to be benefited by the improvement; and thus to create a special taxing district quoad hoc.⁶⁰ For the administration of this improvement the municipality is usually appointed the governmental agency, and empowered through its existing instrumentalities to assess, levy, and collect taxes for the improvement, not only upon lands within, but lands beyond its local boundaries.⁶¹ The power of taxation in such cases is confined to the special levy for the improvement.

STATE MAY IMPOSE.

166. The state, in the exercise of its sovereign power, may impose special taxes upon the municipality for governmental, but not for strictly municipal, purposes.

In creating a municipal corporation and conferring upon it the taxing power, the state does not and cannot surrender its

5 S. D. 84, 58 N. W. 272; *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146, 96 Am. Dec. 715.

The state board of equalization in assessing railroad property should include the value of the franchises with the taxable property. *State v. Savage*, 65 Neb. 714, 91 N. W. 716.

⁵⁹ *People v. Barker*, 84 App. Div. 469, 83 N. Y. Supp. 33; *Armour Packing Co. v. Augusta* (Ga.) 45 S. E. 424; *Orange & A. R. Co. v. Alexandria*, 17 Grat. (Va.) 185; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186; *British Commercial Life Ins. Co. v. Commissioners*, 31 N. Y. 32. *Contra*, *Home Ins. Co. v. Board*, 48 La. Ann. 451, 19 South. 280.

⁶⁰ *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *PEOPLE v. BROOKLYN*, 4 N. Y. 419, 55 Am. Dec. 266.

⁶¹ *In re House Bill No. 165*, 15 Colo. 593, 26 Pac. 141.

own inherent sovereignty over the people and property within the municipal boundaries. No municipal power can exist in perpetuity.⁶² The legislature exercising the sovereign function of legislation may not only repeal the charter, and thus destroy the municipal life, but, since the greater includes the less, it may withdraw powers conferred in whole or in part, and may exercise such powers itself.⁶³ The inherent power of taxation possessed by a state may be exercised by the legislature upon property within as well as without the municipal boundaries; and for any strictly governmental purpose it is conceded that the state may tax municipal property not only for general objects,⁶⁴ but by special assessment for local improvements.⁶⁵

It is also generally recognized by the courts that for purely municipal purposes the municipality may not be taxed by the state without its consent,⁶⁶ though upon this subject the cases are somewhat discordant; but there is great variety of decision in the various cases determining what is a governmental and what is a municipal purpose. The two leading cases in the United States representing these discordant views are those commonly known as the Philadelphia City Hall Case⁶⁷ and the Detroit Park Case,⁶⁸ heretofore discussed. In the former of these it was ruled that the state might compel the city to pay for the erection of "an enormous pile which surpasses the town halls and cathedrals of the Middle Ages in extent, if not in grandeur";⁶⁹ and in the latter that the state could

⁶² *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *PEOPLE v. MORRIS*, 13 Wend. (N. Y.) 325; *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710.

⁶³ *Williamson v. New Jersey*, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

⁶⁴ Ante, §§ 68, 69.

⁶⁵ 2 Dill. Mun. Corp. § 752.

⁶⁶ 1 Dill. Mun. Corp. §§ 72, 73; *Cooley, Const. Lim.* (6th Ed.) 284, 285.

⁶⁷ *PERKINS v. SLACK*, 86 Pa. 283.

⁶⁸ *PEOPLE v. DETROIT*, 28 Mich. 228, 15 Am. Rep. 202.

⁶⁹ 1 Hare, Const. Law, 630.

not compel the city to pay for the purchase and improvement of a city park.⁷⁰ Between these divergent views of legislative control over municipal corporations is found a variety of decisions in divers states as to the legislative power to impose taxes upon a municipality, which generally recognize the doctrine above stated, but differ in its application to particular cases.⁷¹

LIMITATION OF EXPRESS POWER.

167. The municipality may exercise the power of taxation expressly conferred upon it only within constitutional limitations.

This doctrine is so self-evident as scarcely to need elucidation; but much contention has arisen over express charter powers of taxation granted by the legislature, and exercised by a municipality in strict conformity therewith. In practical operation, however, it was sometimes found that this not only wrought injustice, but produced results violative of constitutional protection. In some of these the taxation would not be equal and uniform⁷² as required by the organic law. In oth-

⁷⁰ *PEOPLE v. DETROIT*, supra. Nor build a courthouse. *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677.

⁷¹ *City of Baltimore v. Rietz*, 50 Md. 574; *PRINCE v. CROCKER*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *In re Adams*, 165 Mass. 497, 43 N. E. 682; *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446; *PEOPLE v. BATCHELLOR*, 53 N. Y. 128, 13 Am. Rep. 480; *Jefferson County Com'rs v. People*, 5 Neb. 136; *Jensen v. Supervisors*, 47 Wis. 298, 2 N. W. 320.

⁷² *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Gatlin v. Tarboro*, 78 N. C. 119; *State v. Bank*, 41 La. Ann. 329, 6 South. 582; *Daly v. Morgan*, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; *Marsh v. Supervisors*, 42 Wis. 502.

Uniform taxation requires that the tax must be uniform throughout the territory to which it is applicable. *Day v. Roberts* (Va.) 43 S. E. 362; *State v. Savage*, 65 Neb. 714, 91 N. W. 716; *W. C. Peacock & Co. v. Pratt*, 121 Fed. 772, 58 C. C. A. 48; *Adams v. Bank of Ox-*

ers it would not be for a public, but for a private, purpose.⁷³ Such results, being contrary to fundamental law, cannot be permitted when the power is challenged. The legislature itself can confer upon a municipality no greater measure of power than it possesses; and, since it can enact no valid law contrary to the constitutional provisions, it can confer upon the municipality no power to pass unconstitutional ordinances.⁷⁴

IMPLIED POWER.

168. The municipality may levy taxes for the performance of any municipal duty imposed, or exercise of any municipal function conferred upon it by charter or by general law.

Of the three classes of municipal powers, express, inherent, and implied, it is obvious that a municipality for the purpose of taxation possesses the first within constitutional limitations, but may not exercise any under the second class. What implied power for taxation belongs to a municipal corporation is not so easy to determine. Here, however, as elsewhere, in the construction of municipal charters, the general doctrine is applied that the corporation has by implication such measure of power as is necessary to the proper execution of the charter powers expressly granted.⁷⁵ Thus, as we have seen, the

ford, 78 Miss. 532, 29 South. 402; *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

⁷³ *McInerney v. Huelefeld*, 25 Ky. Law Rep. 272, 75 S. W. 237; *Burroughs, Tax'n*, § 130.

⁷⁴ *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Burr v. Atlanta*, 64 Ga. 225; *City of Marshalltown v. Blum*, 58 Iowa, 184, 12 N. W. 266, 43 Am. Rep. 116; *State v. North*, 27 Mo. 464; *Wiley v. Parmer*, 14 Ala. 627; *Hitchcock v. St. Louis*, 49 Mo. 484; *Weeks v. Milwaukee*, 10 Wis. 242; *CITIZENS' SAVINGS & LOAN ASS'N v. TOPEKA*, 20 Wall. (U. S.) 655, 22 L. Ed. 455.

⁷⁵ *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; *City of Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 118; *Town of Danville v. Shelton*, 76 Va. 325; *City of Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *City of Corvallis v. Carlile*, 10 Or. 139,

power to borrow money implies the power of taxation sufficient to repay the loan.⁷⁶ The power to grade and pave streets implies the power to collect sufficient revenue to pay the expenses of the improvement.⁷⁷ So, also, of the power to preserve public health,⁷⁸ to purchase fire engines and other apparatus,⁷⁹ to erect public buildings,⁸⁰ to purchase lands for public squares and parks,⁸¹ and the like.⁸² Having the general power of taxation, the municipality may exercise it to raise revenue necessary for any of these charter purposes. But it has been held that the taxing power cannot be implied from a general welfare clause in the charter,⁸³ nor from the power to enact by-laws for the good government of the town.⁸⁴ Nor will power to make by-laws to "promote the benefit and advantage of a corporation" authorize it to levy a tax to pay the expense of procuring the location of a railroad through the municipality.⁸⁵ So the power to regulate and improve streets

45 Am. Rep. 134; *Bennett v. Buffalo*, 17 N. Y. 383; *City of Fairfield v. Ratcliff*, 20 Iowa, 396; *Wright v. Chicago*, 20 Ill. 252; *City of Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

⁷⁶ Ante, § 152.

⁷⁷ *City of Annapolis v. Harwood*, supra.

⁷⁸ *In re Taxpayers & Freeholders of Village of Plattsburgh*, 157 N. Y. 78, 51 N. E. 512.

⁷⁹ *Sibley v. Mobile*, 3 Woods, 535, Fed. Cas. No. 12,829; *Desmond v. Jefferson (C. C.)*, 19 Fed. 483; *City of Birmingham v. Rumsey*, 63 Ala. 352.

⁸⁰ *PERKINS v. SLACK*, 86 Pa. 283; *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586; *Trustees of School Dist. No. 1 v. Jameson*, 12 Ky. Law Rep. 719, 15 S. W. 779.

⁸¹ *In re City of New York*, 99 N. Y. 569, 2 N. E. 642.

⁸² *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1113; *Jonas v. Cincinnati*, 18 Ohio, 318; *State ex rel. Stewart v. Police Jury*, 34 La. Ann. 673; *UNITED STATES v. NEW ORLEANS*, 103 U. S. 358, 26 L. Ed. 395.

⁸³ *COMMISSIONERS OF TOWN OF ASHEVILLE v. MEANS*, 29 N. C. 406; *Mays v. Cincinnati*, 1 Ohio St. 268.

⁸⁴ *Ex parte Burnett*, 30 Ala. 461; *COMMISSIONERS OF TOWN OF ASHEVILLE v. MEANS*, supra.

⁸⁵ *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468 (Gil. 424).

does not include the power to make local assessments;⁸⁶ and the power to enact by-laws necessary for the security, welfare, and convenience of the city does not authorize a tax on liquor dealers.⁸⁷ And so rigidly has the doctrine of necessary implication been applied in some cases that it has been held that the power to remove obstructions and widen and deepen public waters does not authorize a local assessment for deepening the city harbor;⁸⁸ and even that the power to subscribe for the stock of a railroad does not include the power to levy a tax to pay for the stock.⁸⁹ But this last case appears to be sporadic.

LICENSE TAX.

169. A license tax may be imposed by the municipality only when power is expressly conferred.

Municipal licenses may be divided into two classes: (1) Police, and (2) revenue. It has been repeatedly held that a municipality may license certain occupations and forbid the exercise of the same by unlicensed persons.⁹⁰ This is under the police power granted to the municipality; but in such case the fee to be charged against the licensee is determined by the necessary expense connected with the police regulation.⁹¹ The taxing power, however, cannot be implied from the police power.⁹² And so it has been repeatedly held that where the sum charged for a municipal license is obviously for purposes of taxation, and not merely a license fee, the charge is un-

⁸⁶ *City of Fairfield v. Ratcliff*, 20 Iowa, 396.

⁸⁷ *Ex parte Burnett*, 30 Ala. 461.

⁸⁸ *Wright v. Chicago*, 20 Ill. 252.

⁸⁹ *Burnes v. Atchison*, 2 Kan. 454.

⁹⁰ *York v. Railroad Co.*, 56 Neb. 572, 76 N. W. 1065; *City of Rochester v. Upman*, 19 Minn. 108 (Gil. 78); *Kitson v. Ann Arbor*, 26 Mich. 826; 2 Dill. Mun. Corp. § 768.

⁹¹ *Burroughs, Tax'n*, § 132.

⁹² *Town of Columbia v. Beasley*, 1 Humph. (Tenn.) 232, 34 Am. Dec. 646; *Kip v. Paterson*, 26 N. J. Law, 298.

authorized and void, unless authority to levy a license tax has been expressly conferred by charter or general legislation.⁹³ The tax on occupations is upon persons pursuing such occupations within the city, whether their residence be inside or outside the corporate limits.⁹⁴ And no discrimination can be made as between residents and nonresidents.⁹⁵ A person residing within a city cannot be taxed upon his occupation if it be pursued exclusively outside the municipality.⁹⁶

POWER EXERCISED—HOW AND BY WHOM.

170. Record evidence of the action of the governing body of the municipality is essential to the validity of a tax levy.

The power of taxation conferred upon a municipality must be exercised by the common council as the governing body of the corporation.⁹⁷ It cannot be delegated by the council to officers or other persons,⁹⁸ unless the power of delegation be expressly conferred by the legislature, and such legislation has been held to be constitutional.⁹⁹ This exercise of the taxing

⁹³ *Postal Tel. Cable Co. v. Norfolk* (Va.) 43 S. E. 207; *City of Cape May v. Transportation Co.*, 64 N. J. Law, 80, 44 Atl. 948; *Bull v. Quincy*, 9 Ill. App. 127; *Craig v. Burnett*, 32 Ala. 728; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Mays v. Cincinnati*, 1 Ohio St. 268; *Benson v. Hoboken*, 33 N. J. Law, 280. As to where permission to charge a license fee has been conferred, see *Wilson v. Lexington*, 105 Ky. 765, 50 S. W. 834; *Morris v. Cummings*, 91 Tex. 618, 45 S. W. 383; *State v. Des Moines*, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157; *City of Lake Charles v. Police Jury*, 50 La. Ann. 346, 23 South. 376.

⁹⁴ *Worth v. Fayetteville*, 60 N. C. 70.

⁹⁵ *City of Nashville v. Althrop*, 5 Cold. (Tenn.) 555; *State v. Charleston*, 2 Speers (S. C.) 719; *Joyce v. Woods*, 78 Ky. 386.

⁹⁶ 2 Dill. Mun. Corp. § 791.

⁹⁷ *Davis v. Read*, 65 N. Y. 566; *Thomson v. Booneville*, 61 Mo. 282; *City of Indianapolis v. Lawyer*, 38 Ind. 348.

⁹⁸ *Foss v. Chicago*, 56 Ill. 354; *Johnston v. Macon*, 62 Ga. 645.

⁹⁹ *Schwartz v. Flatboats*, 14 La. Ann. 243.

power by the council applies alike to general and local assessments; but the legislature may expressly confer upon other bodies or persons the power to make local assessments.¹⁰⁰ It is not an unwarranted exercise or delegation of the power of taxation for a city itself to appoint an engineer or committee to make a local assessment, and to make the levy by receiving and confirming the report.¹⁰¹

Record Necessary.

But there can be no such thing as oral taxation.¹⁰² The governing body in lawful session must enact the ordinance levying the tax, and must make a record of the same, and such levy can be proven only by the record.¹⁰³ In case of loss or destruction of the record it may be established in the manner provided by law.¹⁰⁴ The levy is invalid, and taxes cannot lawfully be collected thereunder, unless it is made by the body, and substantially in the manner directed by law.¹⁰⁵ A void levy cannot be validated by subsequent ratification.¹⁰⁶ But under proper legislative authority a valid reassessment may be made.¹⁰⁷

¹⁰⁰ *Bower v. Bainbridge*, 116 Ga. 794, 43 S. E. 67; *Parker v. New Brunswick*, 30 N. J. Law, 395; *Schenley v. Commonwealth*, 36 Pa. 29, 78 Am. Dec. 359.

¹⁰¹ *West v. Whitaker*, 37 Iowa, 598.

¹⁰² *Farrar v. Fessenden*, 39 N. H. 268.

¹⁰³ *Moser v. White*, 29 Mich. 59; *Godfrey v. Bennington Water Co. (Vt.)* 55 Atl. 654; *City of New York v. Watts*, 40 Misc. Rep. 595, 83 N. Y. Supp. 23.

¹⁰⁴ *Williams v. School Dist.*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

¹⁰⁵ *Burroughs, Tax'n*, § 148; *Allen v. Galveston*, 51 Tex. 302; *LOTT v. ROSS*, 38 Ala. 156; *Bolce v. Plainfield*, 38 N. J. Law, 95; *Green v. Ward*, 82 Va. 324; *City of Orlando v. Association (Fla.)* 33 South. 986.

¹⁰⁶ *Hart v. Henderson*, 17 Mich. 218; *People v. Goldtree*, 44 Cal. 323; *Dean v. Borchsenius*, 30 Wis. 236.

But where a tax was void only because it exceeded the limit imposed by statute, the assessment could be validated by a subsequent act. *Kettelle v. Water Co.*, 23 R. I. 114, 49 Atl. 492.

¹⁰⁷ *Tallman v. Janesville*, 17 Wis. 71; *City of New Orleans v.*

ASSESSMENT AND COLLECTION.

171. Municipal taxes may be assessed and collected by state officers under general law, or by municipal officers thereunto authorized by the state, and appointed and directed by the municipality.

Divers methods of assessing and collecting revenue prevail in the various states. Unless otherwise specially provided by law, the general methods of state taxation are to be pursued by municipalities.¹⁰⁸ Municipal taxes may be assessed and collected by state officers, or municipal officers appointed for this purpose may discharge this duty either as directed by statute or under municipal ordinances when authorized by law.

Tax Duplicates or Assessment Lists.

The municipality may use the tax duplicate or assessment list of the county or a special municipal assessment list may be made for the corporation according as the law may provide.¹⁰⁹ Under the latter method corrections may be made substantially in the same manner as in county assessments.¹¹⁰

Collections—Liens.

And as in case of assessments, so of collections, the duty may be performed under law either by county or municipal officers,¹¹¹ and collections may be enforced in substantially

Poutz, 14 La. Ann. 853; *Fairfield v. People*, 94 Ill. 244; *Doyle v. Newark*, 34 N. J. Law, 236.

¹⁰⁸ *Burroughs, Tax'n*, § 140. Where a special method is prescribed by statute for the collection of taxes, it must be pursued to the exclusion of others based on general principles. *Board of Chosen Freeholders of Atlantic County v. Inhabitants of Weymouth Tp.*, 68 N. J. Law, 652, 54 Atl. 458.

¹⁰⁹ *State v. Godfrey*, 24 Ohio Cir. Ct. R. 455; *Deason v. Dixon*, 54 Miss. 585; *Garey v. City*, 42 Tex. 627; *Nason v. Whitney*, 1 Pick. (Mass.) 140; *Wingate v. Ketner*, 8 Wash. 94, 35 Pac. 591.

¹¹⁰ *Ante*, § 26.

¹¹¹ *Commonwealth v. Jimison*, 205 Pa. 367, 54 Atl. 1036; *Logan*

the same method as that hereinbefore pointed out for quasi corporations.¹¹² A valid assessment constitutes a lien upon the property, which may be enforced by judicial proceeding.¹¹³ An action at law also lies in favor of the corporation against the owner of the property for taxes thereon unpaid.¹¹⁴

Tax a Debt.

In some states taxes due are regarded as a debt, and assumpsit will lie in favor of a municipality against the person in whose name the assessment is made.¹¹⁵ When specially

Co. v. Carnahan (Neb.) 95 N. W. 812; *City of Pensacola v. Sullivan*, 23 Fla. 1, 6 South. 922; *Webb v. Beaufort*, 88 N. C. 496; *City of Ft. Wayne v. Lehr*, 88 Ind. 62; *Hiestand v. New Orleans*, 14 La. Ann. 330.

A tax collector has no authority to sell property beyond the limits of his own county. *Morrison v. Casey*, 82 Miss. 522, 34 South. 145.

¹¹² Ante, § 26.

¹¹³ *Hertzler v. Cass Co.* (N. D.) 96 N. W. 294; *Harris Franklin & Co. v. Layport* (Neb.) 95 N. W. 851; *People v. Smith*, 123 Cal. 76, 55 Pac. 765; *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090; *City of Easton v. Drake*, 9 Kulp (Pa.) 320; *In re Goodwin Gas Stove & Meter Co.'s Estate*, 8 Pa. Dist. R. 483.

Taxes are not liens on property on which they are assessed unless expressly made so by statute. *Skinner v. Christie*, 52 N. J. Eq. 720, 29 Atl. 772; *Burroughs, Tax'n*, §§ 109, 140. But see *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

¹¹⁴ *Meredith v. United States*, 13 Pet. (U. S.) 486, 10 L. Ed. 258. *Contra, Montezuma Valley Water Co. v. Bell*, 20 Colo. 175, 36 Pac. 1102.

¹¹⁵ *Ellis v. People*, 199 Ill. 548, 65 N. E. 428. But the suit should be brought in name of the state. *Chancellor of State v. Elizabeth*, 66 N. J. Law, 687, 52 Atl. 1130; *City of Dubuque v. Railroad Co.*, 39 Iowa, 56; *Rundell v. Lakey*, 40 N. Y. 517; *Town of Geneva v. Cole*, 61 Ill. 397; *CITY OF JONESBOROUGH v. McKEE*, 2 Yerg. (Tenn.) 167; *Winter v. Montgomery*, 79 Ala. 481; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *State ex rel. Kansas City, St. J. & C. R. Co. v. Severance*, 55 Mo. 378.

It was held in Missouri that a municipality cannot impose a tax lien upon property without express charter authority. *City of Springfield v. Starke*, 93 Mo. App. 70. See *Chamberlain v. Woolsey* (Neb.) 92 N. W. 181; *Id.*, 95 N. W. 38.

But see *Brule Co. v. King*, 11 S. D. 294, 77 N. W. 107, where the

authorized upon a municipal levy, a distress warrant may be issued thereon, which has the legal force of judgment and execution at law.¹¹⁶ If the charter is silent, common-law action, and not summary proceeding, is the proper method of enforcing collection.¹¹⁷ These regulations applicable to general taxes are usually held not to apply in local assessments;¹¹⁸ and there are many cases distinguishing debts and taxes,¹¹⁹ and some holding that no common-law action will lie for taxes.¹²⁰ At present, in most of the states efficient methods for collecting municipal taxes, either summary or otherwise, are prescribed by legislation, and resort to common-law remedies is rarely necessary.

only method of collecting personal taxes authorized by the statute is by distress and sale, and it was held that they are not recoverable by action, since they are not debts.

¹¹⁶ *City of Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Noble v. Amoretti* (Wyo.) 71 Pac. 879; *City of Easton v. Drake*, 9 Kulp (Pa.) 320; *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

¹¹⁷ *Corporation of City of Amite v. Clementz*, 24 La. Ann. 27; *City of Jefferson v. McCarty*, 74 Mo. 55; *City of Camden v. Allen*, 26 N. J. Law, 398; *City Council of Augusta v. Dunbar*, 50 Ga. 387.

¹¹⁸ *Paine v. Spratley*, 5 Kan. 525; *Hale v. City of Kenosha*, 29 Wis. 599; *Emery v. Gas Co.*, 28 Cal. 345; *Worcester Agricultural Society v. Worcester*, 116 Mass. 189.

¹¹⁹ *Shaw v. Peckett*, 26 Vt. 486; *Lane Co. v. Oregon*, 7 Wall. (U. S.) 71, 19 L. Ed. 101; *MERIWEATHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197.

¹²⁰ *City of Camden v. Allen*, 26 N. J. Law, 398; *City of Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55; *City of Detroit v. Jepp*, 52 Mich. 458, 18 N. W. 217; *City of Charleston v. Oliver*, 16 S. C. 47.

When the statute provides a remedy for the collection of taxes under given circumstances, that remedy is exclusive of all others. *Chamberlain v. Woolsey* (Neb.) 92 N. W. 181; *Id.*, 95 N. W. 38. And so, also, when a city charter gives a method for the assessment, levy, and collection of city taxes. *City of Rochester v. Gleichauf*, 40 Misc. Rep. 446, 82 N. Y. Supp. 750. But see *City of Burlington v. Railroad Co.*, 41 Iowa, 134; *City of Baltimore v. Howard*, 6 Har. & J. 383.

TAXATION FOR CREDITORS.

172. The courts may compel the levy and collection of taxes by a municipality to satisfy municipal indebtedness.

A municipal creditor having matured indebtedness against a municipality may pursue the usual methods to enforce collection by action at law, judgment, and execution;¹²¹ but, since all municipal property used in the performance of governmental functions is exempt from execution,¹²² such mode of collection usually proves inadequate, and the creditor finds the usual remedy at law greatly embarrassed, and oftentimes totally ineffective. Whenever this is made to appear, the courts will grant him the remedy of mandamus to enforce satisfaction by means of taxation.¹²³

Mandamus.

In the federal courts and some state courts a judgment is an essential prerequisite to this writ;¹²⁴ but in many of the state courts this is not the rule;¹²⁵ and in some the procedure admits of a judgment and mandamus in the same suit.¹²⁶

¹²¹ *Holladay v. Frisbie*, 15 Cal. 630; *Brown v. Gates*, 15 W. Va. 131; *Hart v. New Orleans* (C. C.) 12 Fed. 292.

¹²² *MERIWETHER v. GARRETT*, 102 U. S. 472, 26 L. Ed. 197; *Foster v. Fowler*, 60 Pa. 27; *Darling v. Baltimore*, 51 Md. 1.

¹²³ *City of Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *Klein v. New Orleans*, 99 U. S. 149, 25 L. Ed. 430; *Curry v. Savannah*, 64 Ga. 290, 37 Am. Rep. 74; *DARLINGTON v. MAYOR*, 31 N. Y. 164, 88 Am. Dec. 249.

But one having a general judgment against a city is not entitled to mandamus to compel payment from funds derived from taxes levied for the payment of certain bonds. *State ex rel. Hopper v. Cottengin*, 172 Mo. 129, 72 S. W. 498.

¹²⁴ *Bath Co. v. Amy*, 13 Wall. (U. S.) 244, 20 L. Ed. 539; *People v. Clark*, 50 Ill. 213; *State ex rel. White v. Clay*, 46 Mo. 231; *Coy v. Lyons*, 17 Iowa, 1, 85 Am. Dec. 539.

¹²⁵ *State v. Anderson Co.*, 8 Baxt. (Tenn.) 249; *Louisville & N. R.*

¹²⁶ *City of Watertown v. Cady*, 20 Wis. 501; *Nelson v. Justices*, 1 Cold. (Tenn.) 207.

The court may not appoint officers or commissioners to levy and collect the taxes,¹²⁷ but enforces the collection by mandamus against the officers empowered to perform these functions.¹²⁸ If assessors or collectors fail or refuse to perform their duty in obedience to the order of the court, they may be punished for contempt.¹²⁹ The court may also by appropriate order compel the application of the fund collected to the satisfaction of the plaintiff's demand.¹³⁰

Co. v. County Court, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; Flagg v. Palmyra, 33 Mo. 440; Justices of Clarke County Court v. Turnpike Co., 11 B. Mon. (Ky.) 143; Brown v. Crego, 32 Iowa, 498; State v. Milwaukee, 20 Wis. 87.

¹²⁷ REES v. WATERTOWN, 19 Wall. (U. S.) 107, 22 L. Ed. 72; Walkley v. Muscatine, 6 Wall. (U. S.) 481, 18 L. Ed. 930.

¹²⁸ Maddox v. Graham, 2 Metc. (Ky.) 56; Bassett v. Barbin, 11 La. Ann. 672; State v. Madison, 15 Wis. 30.

¹²⁹ Beachy v. Lamkin, 1 Idaho, 50; Ex parte Holman, 28 Iowa, 88, 5 Am. Rep. 159.

¹³⁰ Galena v. United States, 5 Wall. (U. S.) 705, 18 L. Ed. 560; Coy v. Lyons, 17 Iowa, 1, 85 Am. Dec. 539.

CHAPTER XIX.

ACTIONS.

- 173. A Municipality May Sue and be Sued.
- 174. Plaintiff in Actions Ex Contractu.
- 175. Defendant in Actions Ex Contractu.
- 176. Plaintiff in Actions Ex Delicto.
- 177. Defendant in Actions Ex Delicto.
- 178. Mandamus.
- 179. Quo Warranto.
- 180. Certiorari.
- 181. Complainant in Chancery.
- 182. Defendant in Chancery.
- 183. Injunctions.
- 184. Criminal Prosecution.

A MUNICIPALITY MAY SUE AND BE SUED.

173. Capacity to sue and be sued in its corporate name
essential attribute of the municipal corporation

"Certain powers are incidental to corporate existence are impliedly conferred upon every corporation unless is something in the charter to show an intention to ex them." ¹ Such powers are variously termed "incidental," "essential," "indispensable," or "inherent." ² Among the essential incidents are a corporate name and seal, the power to make by-laws, to purchase, hold, and alienate property, to perpetual succession, and to sue and be sued by the corporate name. ³ Whatever doubts may exist as to the capacity of

¹ Clark, Priv. Corp. § 51.

² 1 Dill. Mun. Corp. § 89; Marsh. Corp. § 57; Arn. Mun. c. 3; Clark, Priv. Corp. § 49.

³ A municipal corporation may sue and be sued in its proper

corporations to sue and be sued,⁴ none pertain to municipal corporations. Being chartered and empowered to exist and act as corporations, they are distinct legal entities, and as such are protected by and amenable to the law. A municipality, therefore, like any other complete corporation or person, may appeal to the courts for vindication of its rights, and for wrong done by it may be sued by the injured party.⁵

PLAINTIFF IN ACTIONS EX CONTRACTU.

174. To redress a wrong arising out of breach of contract, the municipality may bring and maintain the proper common-law action, or any statutory substitute therefor.

A municipality may make contracts with other corporations, public or private, and with natural persons, from the breach of which by them the municipality may suffer loss or damage. For redress of such an injury the courts are open to a municipal corporation just as to a private corporation or a natural person.⁶ The same form of redress is alike open to all for identical injuries. If the contract broken by the other party had been executed under seal, the action of covenant lies to

porate name. *Powers v. Decatur*, 54 Ala. 214; *City of Boston v. Schaffer*, 9 Pick. (Mass.) 415.

A city has inherent power to sue, and therefore need never allege that power. *City of Janesville v. Railroad Co.*, 7 Wis. 484.

Where an action is brought by a city, in its corporate name, by its proper law officers, it will be presumed that the action is authorized, until the contrary appears. *Lincoln St. Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802. See *Clark, Priv. Corp.* § 51.

⁴ Ante, § 34.

⁵ *Burrill v. Boston*, 2 Cliff. 590, Fed. Cas. No. 2,198; *CITY OF JONESBOROUGH v. McKEE*, 2 Yerg. (Tenn.) 167.

⁶ *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *City of Buffalo v. Bettinger*, 76 N. Y. 393.

recover damages for the breach.⁷ If it was an express contract for the payment of a specified sum of money, debt will be the proper form of action.⁸ This form of action has been used to recover a fixed penalty for breach of municipal ordinance.⁹ The municipality may sue in assumpsit to recover for breach of an implied contract;¹⁰ or for any matters of the common counts;¹¹ and also for the penalty of an ordinance whether fixed or discretionary.¹² In states where the common-law forms of action have been abolished, the municipality may avail itself of the proceeding provided in the Code as the equivalents of those above mentioned to redress wrongs arising from breach of contract.¹³ Such actions are subject to the general rules of procedure, applying alike to all plaintiffs, natural and corporate.¹⁴

DEFENDANT IN ACTIONS EX CONTRACTU.

175. The municipality, like any other corporation, is liable to be sued in assumpsit, debt, or covenant, or any equivalent statutory action for breach of contract by it.

As we have heretofore seen, a municipal corporation, within the scope of its charter powers, may contract obligations to

⁷ *St. Joseph County Sup'rs v. Coffenbury*, 1 Mich. 355; *Turner v. Clark Co.*, 67 Mo. 243; *Sweetser v. Hay*, 2 Gray (Mass.) 49.

⁸ 1 Chitty Pl. [14th Am. Ed.] 108.

⁹ *Staats v. Washington*, 45 N. J. Law, 318; *Barter v. Commonwealth*, 3 Pen. & W. (Pa.) 253; 1 Dill. Mun. Corp. § 409.

¹⁰ (Unpaid taxes) *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *CITY OF JONESBOROUGH v. McKEE*, 2 Yerg. (Tenn.) 167; *Town of Geneva v. Cole*, 61 Ill. 397.

¹¹ 1 Chitty Pl. [14th Am. Ed.] 341.

¹² *Ewbanks v. Ashley*, 36 Ill. 178; *Greely v. Passaic*, 42 N. J. Law, 429.

¹³ *Deltz v. Central*, 1 Colo. 323; *Town of Brookville v. Gagle*, 73 Ind. 117; *COATES v. MAYOR*, 7 Cow. (N. Y.) 585.

¹⁴ *Fitch v. Pinckard*, 5 Ill. 78; *City Council v. Dunn*, 1 McCord (S. C.) 333; *Napman v. People*, 19 Mich. 352; *Keeler v. Milledge*, 24 N. J. Law, 142.

others, which it may not violate with impunity. The possession by the municipality of the sovereign powers of police, taxation, and eminent domain does not give it immunity from legal obligation, nor exempt it from the process of law.¹⁵ Being capable to contract within the scope of its powers, it assumes thereby legal obligation, for the breach of which an action will lie against it just as against other corporations or persons.¹⁶ If the contract broken was executed by the corporation with due formality under its corporate seal, covenant will lie against it.¹⁷ Indeed, in England this is the only proper form of action on an executory contract, which lies against a municipality, since informal corporate contracts are not there recognized.¹⁸ But in America, as we have heretofore seen, corporations may be bound by contracts informally executed by its officers, either in writing or orally.¹⁹ For breach of such contracts the proper action would be debt or assumpsit, according to the rules distinguishing these two kinds of action.²⁰ In the Code states the action would be brought in

¹⁵ 1 Dill. Mun. Corp. § 9.

¹⁶ *Burnett v. Abbott*, 51 Ind. 254; *City of New Orleans v. Gullotte's Heirs*, 12 La. Ann. 818; *Douglass v. Virginia City*, 5 Nev. 147.

¹⁷ *Morrell v. Sylvester*, 1 Greenl. (Me.) 248; *People v. Benfield*, 80 Mich. 265, 45 N. W. 135; *Town of Montville v. Haughton*, 7 Conn. 543; *City of Platteville v. Hooper*, 63 Wis. 381, 23 N. W. 583; *Mayor, etc., of City of New York v. Crawford*, 111 N. Y. 638, 19 N. E. 501.

¹⁸ Arn. Mun. Corp. p. 29.

¹⁹ Ante, § 101.

²⁰ *ARGENTI v. SAN FRANCISCO*, 16 Cal. 255; *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71; *Louisiana City v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *City of Nashville v. Toney*, 10 Lea (Tenn.) 643; *Peterson v. Mayor*, 17 N. Y. 449; *Tucker v. Virginia City*, 4 Nev. 20.

So, also, for a void tax paid under compulsion or protest. *City of Grand Rapids v. Blakely*, 40 Mich. 367, 29 Am. Rep. 539; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Briggs v. Lewiston*, 29 Me. 472; *Thomas v. Burlington*, 69 Iowa, 140, 28 N. W. 480; *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *City of Marshall v. Snediker*, 25 Tex. 460, 78 Am. Dec. 534; *Smith v. Farrelly*, 52 Cal. 77; *Stephan v. Daniels*, 27 Ohio St. 527.

the manner provided for redressing injuries arising ex contractu.²¹ Appearance to actions may be entered only by attorney, since corporations cannot appear in person.²²

Execution.

Actions may be prosecuted to judgment against the municipality as against any other corporation or person; but in some states the mode of executing the judgment is not identical with that against a private corporation. In some states the judgment is allowed to be executed by an ordinary writ of fieri facias issued against the property of the municipality.²³ It may then be levied upon such goods, chattels, lands and tenements, owned by the municipality, as are not indispensable to the public convenience and safety. But the doctrine prevailing in America is that municipal property is not subject to levy on either attachment or execution. The substitute for fieri facias in such cases is mandamus against the municipality and its officers commanding the satisfaction of the debt out of the municipal treasury,²⁴ and, if necessary, a tax levy to raise the funds required therefor.²⁵

²¹ Ante, § 13.

²² Arn. Mun. Corp. p. 28; Coke, Lit. c. 28, 66; Case of St. Mary's Hospital, 10 Coke, 30. But see Sharp v. New York, 31 Barb. 572.

²³ City of Independence v. Trouville, 15 Kan. 70; Gabler v. City of St. Louis, 42 N. J. Law, 79; DARLINGTON v. MAYOR, 31 N. J. 88 Am. Dec. 248; Mayor, etc., of Birmingham v. Rumsey, 63 Ala. 118; City of Independence v. Trouville, 15 Kan. 70; City of St. Louis v. Bess, 120 Mo. 118; City of New Orleans v. United States Fidelity and Insurance Co., 23 La. Ann. 61; Same v. Morris, 105 U. S. 600, 26 L. Ed. 1184; Freem. Ex'ns, §§ 22, 126.

²⁴ Brown v. Gates, 15 W. Va. 131; City of New Orleans v. United States Fidelity and Insurance Co., 23 La. Ann. 61; Same v. Morris, 105 U. S. 600, 26 L. Ed. 1184; Freem. Ex'ns, §§ 22, 126.

²⁵ No execution can issue against a municipal corporation. See City of Sheridan v. Hibbard, 19 Ill. App. 421; Id., 119 Ill. 307, 901; City of Cairo v. Allen, 3 Ill. App. 398; City of Flora v. City of Chicago, 136 Ill. 45, 26 N. E. 645; Monaghan v. Philadelphia, 28 Pa. 136; City of McGregor v. Cook (Tex.) 16 S. W. 936; Emeric v. City of St. Louis, 10 Cal. 404, 70 Am. Dec. 742; Townsend v. Greeley, 5 Wall. 326, 18 L. Ed. 547; Crane v. Fond du Lac, 16 Wis. 196; City of Savannah, 64 Ga. 290, 37 Am. Rep. 74.

²⁶ Gooch v. Gregory, 65 N. C. 142; City of Bloomington v. I.

²⁷ Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. Ed. 490; City Council, 17 Iowa, 1, 85 Am. Dec. 539.

PLAINTIFF IN ACTIONS EX DELICTO.

176. If a municipality suffers an injury to any corporate right or property from the tortious act or conduct of another corporation or person, it may have redress therefor by the proper common-law action, or its modern statutory substitute.

A municipal corporation may suffer injury in its property from the wrongful acts or omissions of other persons or corporations. Some of these may be redressed, as shown hereinbefore,²⁸ by action for penalty for breach of municipal ordinance; others may not be provided for in the municipal code. But whether the wrong done is or is not within the prohibition of the municipal ordinance, the courts are open to the municipality for the vindication of its rights and the redress of its wrongs according to the course of the common law; and, like any other person or corporation suffering an injury from tortious conduct of another, the municipality may bring suit and recover damages to compensate its loss.²⁹

77 Ill. 194; *Charnock v. Colfax*, 51 Iowa, 70, 50 N. W. 286, 33 Am. Rep. 116; *Klein v. New Orleans*, 99 U. S. 149, 25 L. Ed. 430; *Amy v. Galena*, 10 Biss. 263, 7 Fed. 163; *Monaghan v. Philadelphia*, 28 Pa. 207; *United States v. New Orleans (C. C.)* 17 Fed. 483.

²⁸ Ante, § 76.

²⁹ *Whitfield v. Longest*, 28 N. C. 268; *City of Bridgeport v. Railroad Co.*, 15 Conn. 475; *Union Coal Co. v. La Salle*, 136 Ill. 119, 28 N. E. 506, 12 L. R. A. 326; *Jersey City v. Dummer*, 20 N. J. Law, 86, 40 Am. Dec. 213; *Town of Castleton v. Langdon*, 19 Vt. 210; *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75); *Town of Bath v. Boyd*, 23 N. C. 196; *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. 797.

DEFENDANT IN ACTIONS EX DELICTO.

177. For any tort committed or permitted by a municipal corporation, an action lies against it to any one sustaining loss or damage therefrom in person or property.

How a municipal corporation may be guilty of tort has been set forth at length in a previous chapter.³⁰ Whenever, under the rules there stated, a municipality commits or permits a tort, the person sustaining damage therefrom may redress his wrong by the appropriate common-law action, which may be case, trespass, detinue, trover, or replevin, according to the nature of the wrong done.³¹ Ejectment also, and entry and detainer, may be brought upon proper facts against the municipality as well as by it.³²

Qui Tam Actions.

It has also been held that a municipality, as well as a natural person, is liable to a qui tam action provided by statute, to be brought by any private person to recover a penalty imposed for nonfeasance or misfeasance in the matter of a statutory duty.³³

Not Liable—When.

But the municipal corporation is not liable to an action ex delicto unless it has committed or permitted a tort. This self-

³⁰ Chapter 16.

³¹ *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308; *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Town of Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640; *First Parish in Sudbury v. Stearns*, 21 Pick. (Mass.) 148; *School Dist. No. 5 v. Lord*, 44 Me. 374; *City of Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *Chadbourne v. Newcastle*, 48 N. H. 196; *Williams v. New Orleans*, 23 La. Ann. 507; *Albrittin v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46.

³² *Sower v. Philadelphia*, 35 Pa. 231; *City of Boston v. Robbins*, 126 Mass. 384; *Armstrong v. St. Louis*, 69 Mo. 309, 33 Am. Rep. 499.

³³ *Bronson v. Washington*, 57 Conn. 346, 18 Atl. 264.

evident proposition needs attention as a warning against deceptive appearances. Private injuries are often sustained from the act or neglect of municipal officers, contractors, or employes, for which no action lies against the municipality. Such cases are embraced in three classes: (1) Governmental acts; (2) acts ultra vires; (3) unauthorized acts. A wrongful act done by any one without authority from the municipality is not the act of the corporation.³⁴ A wrongful act by the governing body of a municipality, or any officer or contractor, which is wholly outside the charter powers of the corporation, resulting in private injury, is not the tort of the municipality, but of the persons committing it.³⁵ The act of the municipality, as the agency of the state for the performance of governmental functions, is not, in law, the act of the corporation, but of the state;³⁶ and therefore, unless the sovereign condescends to be sued, no action will lie either against it or its agent.³⁷ In fine, two elements are indispensable to

³⁴ Ante, § 145; *Everson v. Syracuse*, 100 N. Y. 577, 3 N. E. 784; *City of Corsicana v. White*, 57 Tex. 382; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Perley v. Georgetown*, 7 Gray (Mass.) 464; *Barney v. Lowell*, 98 Mass. 571; *Dooley v. Sullivan*, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; *Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Board of Com'rs of Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298.

³⁵ Ante, § 146; *City of Albany v. Cunliff*, 2 N. Y. 165; *Morrison v. Lawrence*, 98 Mass. 219; *Campbell's Adm'x v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656; *Conelly v. Nashville*, 100 Tenn. 262, 46 S. W. 565.

³⁶ *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; *City of Richmond v. Long's Adm'rs*, 17 Grat. (Va.) 375, 94 Am. Dec. 401; *Ham v. New York*, 70 N. Y. 459; *SNIDER v. ST. PAUL*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; *WHEELER v. CINCINNATI*, 19 Ohio St. 19, 12 Am. Rep. 368; *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419.

³⁷ *HAYES v. OSHKOSH*, 33 Wis. 314, 14 Am. Rep. 760; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *DARGAN v. MOBILE*, 31 Ala. 469, 70 Am. Dec. 505; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591.

such actions: (1) The wrong must be at the hands of the corporation; (2) it must be a tort—i. e., an actionable injury.

MANDAMUS.

178. The writ of mandamus is granted by the courts against a municipality and its officers for refusing or culpably neglecting to perform any corporate or official duty, ministerial in kind, the injury resulting from which may not be adequately redressed by any other legal remedy.

Incidentally it has hitherto appeared that the writ of mandamus is used against a municipality as a substitute for the writ of fieri facias;²⁸ but this is not the only, nor, indeed, the most frequent, occasion for the use of this extraordinary process against a municipality. It is no longer generally considered in America a prerogative writ, but is a common method of redressing private as well as public injuries suffered from the misconduct of state or municipal officers in neglecting or refusing to perform plain ministerial duties.²⁹

It has been employed in the United States not only to compel

²⁸ Ante, § 175 (execution).

²⁹ United States v. Hitchcock, 19 App. D. C. (U. S.) 333; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717; Traynor v. Beckham, 74 S. W. 1106, 25 Ky. Law Rep. 283; Id., 76 S. W. 844, 25 Ky. Law Rep. 981.

Mandamus will lie to compel the performance of purely municipal duties incumbent on an officer by virtue of his office, and concerning which he has no discretionary powers. Warmolts v. Keegan (N. J.) 54 Atl. 813; Brooklyn Teachers' Ass'n v. Board, 85 App. Div. 47, 83 N. Y. Supp. 1.

Where the duty of the officer involves discretion or judgment, a writ of mandamus will issue to compel him to act and decide, but not to direct in what way or in whose favor he shall decide. Kimberlin v. Commission, 104 Fed. 653, 44 C. C. A. 109; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820. See Rex v. Stepney, 71 Law J. K. B. 238, [1902] 1 K. B. 317. But see Town of Cicero v. People, 105 Ill. App. 406.

the induction of a commissioned officer into his office,⁴⁰ and to compel the performance of a municipal duty,⁴¹ but also against the corporation and its delinquent officer to compel them to correct an erroneous assessment for taxation;⁴² to audit a municipal claim;⁴³ to issue a municipal warrant to pay the same;⁴⁴ to satisfy a judgment;⁴⁵ to pay for property

⁴⁰ *State v. Sherwood*, 15 Minn. 221 (Gil. 172), 2 Am. Rep. 116; *State v. Smith* (Mo.) 15 S. W. 614; *Williams v. Rahway*, 33 N. J. Law, 111.

⁴¹ *People v. Bloomington*, 63 Ill. 207; *Webster v. Chicago*, 83 Ill. 458.

⁴² *People v. Board*, 39 Misc. Rep. 162, 79 N. Y. Supp. 145; *People v. Molloy*, 161 N. Y. 621, 55 N. E. 1099; *People v. Wilson*, 119 N. Y. 515, 23 N. E. 1064.

⁴³ *People v. Board*, 66 App. Div. 66, 72 N. Y. Supp. 568; *People v. Coler*, 48 App. Div. 492, 62 N. Y. Supp. 964.

Where a board of county commissioners disallowed a claim for services rendered the county on the advice of the county attorney that the claim was illegal, and the board had no power to audit or allow any of its items, mandamus would lie to compel the board to audit the claim on its merits if there was any item in the claim which the board had power to allow. *Chipman v. Auditors*, 127 Mich. 490, 86 N. W. 1024. Mandamus will lie to compel commissioners to act on a claim when they have refused to act, but not to direct their action. *Robey v. Com'rs*, 92 Md. 150, 48 Atl. 48. See *People v. Mole*, 85 App. Div. 33, 82 N. Y. Supp. 747.

⁴⁴ The owner of a city warrant may by mandamus compel its payment, where it is legally issued by the city, and there are sufficient funds in the treasury. *Wyker v. Francis*, 120 Ala. 509, 24 South. 895; *Wright v. Kinney*, 123 N. C. 618, 31 S. E. 874.

But the Supreme Court, in its discretion, may revise a mandamus on a city officer to sign a warrant to pay a claim when it appears that the relator should establish his right in a proceeding in which the city might present a defense. *Padavano v. Fagan*, 66 N. J. Law, 167, 48 Atl. 998.

⁴⁵ *City of Helena v. U. S.*, 104 Fed. 113, 43 C. C. A. 429; *Marlon Co. v. Coler*, 75 Fed. 352, 21 C. C. A. 392.

Mandamus will lie to compel a city to make an authorized tax levy to pay a debt against it. *City of Sherman v. Langham* (Tex.) 40 S. W. 740, 39 L. R. A. 258; *Stevens v. Miller*, 3 Kan. App. 192, 43 Pac. 439.

But where a city has already levied a tax to the limit allowed by

taken by eminent domain;⁴⁶ to pay a specific sum of money according to a particular promise to satisfy bonds or matured coupons;⁴⁷ to issue bonds to pay for a public improvement completed or in progress;⁴⁸ to include certain items in a budget;⁴⁹ to deliver office and records thereof to an officer;⁵⁰ to apportion revenues and appropriate particular funds as required by law;⁵¹ to observe and enforce civil service regulations;⁵² and generally to do and perform any corporate or

law, the proceeds of which have been used for necessary city expenses, it will not be compelled to levy an additional tax to pay outstanding city warrants. *Portland Sav. Bank v. Montesano*, 14 Wash. 570, 45 Pac. 158; *City of Sherman v. Smith (Tex.)* 35 S. W. 294.

⁴⁶ *Rudisill v. State*, 40 Ind. 485; *Dodge v. Essex Co.*, 3 Metc. (Mass.) 380.

⁴⁷ *Fleming v. Dyer (Ky.)* 47 S. W. 444.

⁴⁸ *PEOPLE v. BATCHELLOR*, 53 N. Y. 128, 13 Am. Rep. 480; *Miller v. Committee*, 24 N. J. Law, 54; *Higgins v. Chicago*, 18 Ill. 276.

If the common council of a city neglect to proceed to open a street after the award of damages to the owners on the lands taken for the street has been made and confirmed by lapse of time in which to make an appeal, mandamus will lie to compel them to proceed. *People v. Common Council*, 20 How. Prac. (N. Y.) 491.

⁴⁹ *Barrett v. New Orleans*, 33 La. Ann. 542.

A writ of mandamus will not be granted to compel the mayor of a city to include in the annual budget an appropriation to pay re-lator's judgment against the city, when the budget has already been made, and the taxes levied before the time the writ could issue. *State ex rel. Foy v. New Orleans*, 49 La. Ann. 946, 22 South. 370.

⁵⁰ *Stevens v. Carter*, 27 Or. 553, 40 Pac. 1074, 31 L. R. A. 342; *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769.

But when an office is filled by an actual incumbent exercising its functions de facto and under color of right, mandamus will not lie to compel him to turn over the books of the office to another, the question of title to the office being involved; quo warranto being the proper remedy. *Ashwell v. Bullock*, 122 Mich. 620, 81 N. W. 577; *Pipper v. Carpenter*, 122 Mich. 688, 81 N. W. 962.

⁵¹ *Ingerman v. State*, 128 Ind. 225, 27 N. E. 499; *City of New Orleans v. U. S.*, 49 Fed. 40, 1 C. C. A. 148; *Hunter v. Mobley*, 26 S. C. 102, 1 S. E. 670; *State v. White*, 29 Neb. 288, 45 N. W. 631.

⁵² *People v. Hertle*, 46 App. Div. 505, 60 N. Y. Supp. 23.

official duty ministerial in its nature, plainly required by law, and for which no other adequate legal remedy is provided.⁵³

Refused When.

Mandamus is not granted to compel the performance of any legislative or judicial function,⁵⁴ or the discharge of any discretionary duty.⁵⁵ The tremendous power of this extraordinary writ is only to be invoked and exercised by the courts when there is a concurrence of three essential conditions: (1) The municipal duty must be plain and ministerial;⁵⁶ (2) the right of the relator must be clear and controlling;⁵⁷ (3) there must be lack of any other adequate legal remedy.⁵⁸

⁵³ *Territory v. Crum*, 13 Okl. 9, 73 Pac. 297; *State v. Jelks*, 138 Ala. 115, 35 South. 60.

⁵⁴ *State ex rel. New Orleans & C. R. Light & Power Co. v. St. Paul*, 110 La. 722, 34 South. 750. A court of equity has no power to compel a city to erect a sewer. *Horton v. Nashville*, 72 Tenn. (4 Lea) 39, 40 Am. Rep. 1; *McCoy v. State*, 2 Marv. (Del.) 543, 36 Atl. 81; *Patterson v. Taylor*, 98 Ga. 646, 25 S. E. 771; *Board of Health v. People*, 102 Ill. App. 614. Mandamus will not lie unless there is a palpable abuse of discretion. *People v. Van Cleave*, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; *Commonwealth v. Park*, 10 Phila. (Pa.) 445; *People v. Listman*, 84 App. Div. 633, 82 N. Y. Supp. 784.

⁵⁵ The Supreme Court will not attempt by mandamus to control the discretionary powers of the district court. *State v. Stull* (Neb.) 96 N. W. 121; *United States v. Hay*, 20 App. D. C. 576.

But where a public officer is guilty of so gross an abuse of discretionary power or evasion of duty as to amount to a refusal to perform the act enjoined, or to act at all in contemplation of law, mandamus will afford a remedy. *People v. Board*, 176 Ill. 576, 52 N. E. 334.

⁵⁶ *State v. Jelks*, supra; *Traynor v. Beckham*, 25 Ky. Law Rep. 283, 74 S. W. 1105.

When the duties of a public officer are merely ministerial, mandamus is the proper remedy to compel a performance. *People v. Van Cleave*, supra; *Orman v. People* (Colo.) 71 Pac. 430.

⁵⁷ *Phoenix Iron Co. v. Commonwealth*, 113 Pa. 563, 6 Atl. 75; *State v. McCabe*, 74 Wis. 481, 43 N. W. 322; *People v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63.

⁵⁸ *Councils of Reading v. Commonwealth*, 11 Pa. 196, 51 Am. Dec.

Moreover, it is to be noted that while the writ may be issued upon the relation of a private person for the enforcement of his personal rights, when the interest of the public is to be subserved, or the right of the state to be enforced, the judicial machinery can be set in motion by the attorney general only.⁵⁹ Under these well-recognized and wholesome regulations the courts have refused mandamus to compel the issuance of a discretionary license by a mayor;⁶⁰ the approval of an official bond;⁶¹ the enforcement of a private contract;⁶² the levy of a tax to satisfy a collusive judgment upon ultra vires bonds;⁶³ the raising of revenue for an unauthorized purpose;⁶⁴ the signing of bonds in escrow issued under an unconstitutional statute;⁶⁵ the removal of electric poles from side-

534; *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398; *PEOPLE v. BROOKLYN*, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502.

⁵⁹ *People v. Inspectors*, 4 Mich. 187; *In re Wellington*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; *Scripture v. Burns*, 59 Iowa, 70, 12 N. W. 760.

⁶⁰ *Deehan v. Johnson*, 141 Mass. 23, 6 N. E. 240; *People v. Scully*, 23 Misc. Rep. 732, 53 N. Y. Supp. 125.

But where an applicant has complied with all legal requirements, and the officer, without reason, refuses to issue the license, he may be compelled by mandamus. *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *People v. Perry*, 13 Barb. (N. Y.) 206; *Dean v. Campbell* (Tex.) 59 S. W. 294; *Bankers' Life Ins. Co. v. Howland*, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374.

⁶¹ *Knox Co. v. Johnson*, 124 Ind. 145, 24 N. E. 148, 7 L. R. A. 684, 19 Am. St. Rep. 88; *State ex rel. Monlin v. New Orleans*, 49 La. Ann. 1322, 22 South. 354.

⁶² *Parrott v. Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439.

⁶³ *Union Bank of Richmond v. Commissioners*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

⁶⁴ Where the statute authorized a county to subscribe for stock in a railroad company, and issue its bonds therefor, limiting its power to provide for the payment of them to an annual special tax of a certain percentage, and other laws authorized the levy of a tax for general purposes upon the assessed value of the taxable property of the county, it was held that in the absence of further legislation mandamus would not lie to compel the levy of a tax. *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331.

⁶⁵ Mandamus lies to compel a party to do that which it is his duty

walks;⁶⁶ the revocation of municipal permission for placing them there;⁶⁷ the delivery of a bank check;⁶⁸ the exclusion of territory from the municipal boundaries;⁶⁹ the removal of a picture from the rogues' gallery;⁷⁰ the closing of a contract with an alleged lowest bidder or other person;⁷¹ or the performance of any other municipal or official duty, legislative, judicial, or discretionary, and especially where the relator's right is not plain and controlling, or he has other remedy at law.⁷²

to do; but it confers no new authority, and the party to be compelled must have authority to do the act. *Brownsville Taxing Dist. v. Loague* (1888) 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780.

⁶⁶ *Commonwealth v. Borough of West Chester*, 9 Pa. Co. Ct. R. 542.

Since the duties of municipal officers authorized to award contracts are not ministerial, but such officers are entrusted with discretionary authority, mandamus will not lie to compel them to change their decision on such question in the absence of fraud or collusion. *Potts v. Philadelphia*, 8 Pa. Dist. R. 728.

⁶⁷ *Commonwealth v. West Chester*, supra; *Dechert v. Commonwealth*, 113 Pa. 229, 6 Atl. 229.

⁶⁸ *Anderson v. Detroit*, 124 Mich. 471, 83 N. W. 145.

⁶⁹ *Young v. Carey*, 80 Ill. App. 601. But see *Steele v. Willis*, 23 Ky. Law Rep. 826, 64 S. W. 417.

⁷⁰ *People v. York*, 27 Misc. Rep. 658, 59 N. Y. Supp. 418.

⁷¹ *Talbot Pav. Co. v. Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604.

The discretion given by a city charter to the common council to let public contracts to the lowest bidder cannot be controlled by mandamus. *Brown v. Houston* (Tex. Civ. App.) 48 S. W. 760.

⁷² *Cannon v. Board*, 24 R. I. 473, 53 Atl. 637; *Edward C. Jones Co. v. Guttenberg*, 66 N. J. Law, 659, 51 Atl. 274; *Jones v. Fonda*, 85 App. Div. 265, 83 N. Y. Supp. 1012; *Storer Post*, No. 1, G. A. R. v. Page, 70 N. H. 280, 47 Atl. 264.

A writ of mandamus will only issue, requiring the officer to do something therein specified. *Hoover v. Reep*, 10 Kulp (Pa.) 59, 14 York Leg. Rep. 62; *United States v. Wight*, 15 App. D. C. 463.

But where there is a reasonable uncertainty of the right of an action at law, mandamus will lie. *People v. Treanor*, 15 App. Div. 528, 44 N. Y. Supp. 528.

QUO WARRANTO.

179. A quo warranto proceeding, either common-law or statutory, may be instituted against a municipality usurping a public franchise, or against any person usurping a municipal office.

The key to this writ is found in the literal translation of its name: "By what authority?" The writ issued in the name of the king to the person or corporation alleged as usurping a franchise or an office was a prerogative writ at common law, demanding of the defendant to show by what warrant or authority the holding of the office or exercise of the franchise could be justified; and upon failure of the defendant to show a proper legal warrant judgment of ouster followed.⁷³ The common-law writ is not in use in America;⁷⁴ but the principles controlling it are recognized as part of the common law, and control the proceedings on information in the nature of a quo warranto prevailing in the United States, either by statute or by judicial recognition.⁷⁵ It may be used against a municipality upon information by the attorney general for the purpose of testing certain power exercised by it, or the validity of its charter.⁷⁶ The proceeding may likewise be i

⁷³ It originally issued only at the instance of the sovereign against any person who usurped any franchises or liberty against the king, or for misuser or nonuser of franchises or privileges granted by the king. *State v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263; *Commonwealth v. Murray*, 11 Serg. & R. (Pa.) 73, 14 Am. Dec. 614.

⁷⁴ *Dane v. Derby*, 54 Me. 95, 89 Am. Dec. 722; *Commonwealth v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75.

⁷⁵ *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 242; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *State v. Evans*, 585, 36 Am. Dec. 468; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Commonwealth v. Arrison*, 15 Serg. & R. (Pa.) 127, 16 Am. Dec. 531; *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70.

⁷⁶ *Moore v. Seymour* (N. J. Sup.) 55 Atl. 91.

Quo warranto proceedings to oust a municipal corporation from the exercise of a franchise which it usurps must be brought against the corporation.

tuted on private information against a person claiming a municipal office for the purpose of testing his title thereto.⁷⁷

A clear distinction in practice between mandamus and quo warranto for this purpose is shown in the rule that mandamus will not lie if there be color of title in the alleged usurper, for under this writ questions of title cannot be tried; neither can an incumbent be expelled from office;⁷⁸ whereas in quo warranto the question of title to the office is open for trial and decision, and the incumbent may be ousted from office.⁷⁹ But a private person cannot institute a proceeding in quo warranto to disturb a corporation, except under the approval of the attorney general; and even then not unless he have an interest in the subject-matter, and has not consented to the usurpation.⁸⁰ Generalizations upon this writ are hazardous.

the corporation itself, and not against its officers. *State ex rel. Crow v. Fleming*, 158 Mo. 558, 59 S. W. 118; *School Dist. v. Smith*, 90 Mo. App. 215; *State v. Mansfield* (Mo. App.) 72 S. W. 471; *State v. McLean Co.*, 11 N. D. 356, 92 N. W. 385.

⁷⁷ *Marshall v. Board*, 103 Ill. App. 65; *Id.*, 201 Ill. 9, 66 N. E. 314; *Ptacek v. People*, 94 Ill. App. 571; *Id.*, 194 Ill. 125, 62 N. E. 530; *Gilbert v. Craddock*, 67 Kan. 346, 72 Pac. 869; *Ellis v. Greaves*, 82 Miss. 36, 34 South. 81; *Miller v. Same*, *Id.*; *State v. Lelscher*, 117 Wis. 475, 94 N. W. 299.

⁷⁸ *Maxwell v. Board*, 139 Cal. 229, 72 Pac. 996; *Ashwell v. Bullock*, 122 Mich. 620, 81 N. W. 577; *Pipper v. Carpenter*, 122 Mich. 688, 81 N. W. 962; *Lyon v. Board*, 120 N. C. 237, 26 S. E. 929.

⁷⁹ *Demar v. Boyne*, 103 Ill. App. 464; *Casey v. Chase*, 64 N. J. 207, 44 Atl. 872; *Robertson v. Bayonne*, 58 N. J. Law, 326, 33 Atl. 734; *Clayton v. Board*, 60 N. J. Law, 364, 37 Atl. 725; *Simon v. Hoboken*, 52 N. J. Law, 367, 19 Atl. 259; *Commonwealth v. Cornell*, 5 Lack. Leg. N. (Pa.) 332; *State v. Mott*, 111 Wis. 19, 86 N. W. 569; *State v. Broatch* (Neb.) 94 N. W. 1016; *State v. Conser*, 24 Ohio Cir. Ct. R. 270; *State v. Wheatley*, 160 Ind. 183, 66 N. E. 684; *Otis v. Lane* (N. J. Err. & App.) 54 Atl. 442; *Nolen v. State*, 118 Ala. 154, 24 South. 251; *Gray v. State*, 19 Tex. Civ. App. 521, 49 S. W. 699.

⁸⁰ *Duffy v. State*, 60 Neb. 812, 84 N. W. 264; *State v. Agee*, 105 Tenn. 588, 59 S. W. 340.

The safe path for its use can be found only by consulting the local statutes and decisions upon this proceeding.⁸¹

CERTIORARI.

180. The corporate acts and proceedings of a municipality may be inquired into by certiorari to determine jurisdiction and validity.

The common-law writ of certiorari cannot be employed in municipal affairs as a substitute for an appeal,⁸² nor for the correction of errors of fact.⁸³ It is the proper writ for determining questions of jurisdiction,⁸⁴ and fatal errors of law

⁸¹ In some states the courts have given judicial recognition to the modern substitute for the prerogative writ of the common law, and by decision and rule of court conformed the common-law procedure to the local statutes and practice; while in others the legislatures have by statute effected similar results. Each state, however, has its own peculiar method of proceeding in the nature of quo warranto, which is controlling in its courts.

⁸² *Eels v. Baille*, 118 Iowa, 519, 92 N. W. 668; *State v. Miller*, 109 La. 704, 33 South. 739; *State v. Superior Ct.*, 30 Wash. 77, 70 Pac. 256; *State v. Tomkies*, 49 La. Ann. 1162, 22 South. 336; *Sowles v. Bailey*, 69 Vt. 277, 37 Atl. 751; *Lawler v. Lyness*, 112 Ala. 386, 20 South. 574; *State v. Moehlenkamp*, 133 Mo. 134, 34 S. W. 468; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491.

Common-law certiorari will not issue where the party has an adequate remedy by appeal. *State v. Railroad Co.*, 100 Wis. 538, 77 N. W. 193; *Oyster v. Bank*, 107 Iowa, 39, 77 N. W. 523. See, also, *Ex parte Howard-Harrison Iron Co.*, 130 Ala. 185, 30 South. 400; *Walker v. Wantland*, 2 Ind. T. 32, 47 S. W. 354; *State ex rel. Bromade v. St. Paul*, 104 La. 103, 28 South. 839.

⁸³ *Somers v. Wescoat*, 66 N. J. Law, 551, 49 Atl. 462; *Nobles v. Plollett*, 16 Pa. Super. Ct. 356; *Appeal of Welsh*, 22 Pa. Super. Ct. 392; *Henkle v. Bussey*, 50 La. Ann. 1135, 24 South. 240; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491; *Morse, Williams & Co. v. Baake*, 68 N. J. Law, 591, 53 Atl. 693; *Wilson v. Mayor*, 32 N. J. Law, 365.

⁸⁴ *State v. District Court*, 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831; *Nordyke & Marmon Co. v. McConkey*, 7 Idaho, 562, 64 Pac. 893; *Bardes v. Hutchinson*, 113 Iowa, 610, 85 N. W. 797;

in proceeding.⁸⁵ To determine either of these questions it may be sued out against a municipal corporation and its common council, or any other board or official exercising judicial functions, where no appeal or writ of error will lie.⁸⁶ Originally, this writ was confined to matters of judicial decision by inferior tribunals;⁸⁷ but the tendency of modern decision, and especially in the Code states, is to employ it for the purpose of revising obvious acts of injustice in municipal corporations, even in matters which are apparently ministerial.⁸⁸ It has accordingly been used with respect to proceedings in laying out, altering, or closing a public street,⁸⁹ and in regard to local assessments and other similar proceedings.⁹⁰

Gaster v. Whitchee, 117 Wis. 668, 94 N. W. 787; *Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; *Butterfield v. Treichler*, 113 Iowa, 328, 85 N. W. 19. See *State v. Gill*, 137 Mo. 627, 39 S. W. 81; *Quinchard v. Trustees*, 113 Cal. 664, 45 Pac. 856; *Walls v. Jersey City*, 55 N. J. Law, 511, 26 Atl. 828.

⁸⁵ *In re Minnetonka Dam*, 83 Minn. 464, 86 N. W. 455; *State v. District Court*, Id.; *Shoup v. Shoup*, 205 Pa. 22, 54 Atl. 476; *Home Savings & Trust Co. v. District Court (Iowa)* 95 N. W. 522; *McKee v. Same*, Id.

⁸⁶ *People v. Shaw*, 34 App. Div. 61, 54 N. Y. Supp. 218; *Morse v. Norfolk Co.*, 170 Mass. 555, 49 N. E. 925; *Devlin v. Dalton*, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379; *People v. Commissioners*, 32 App. Div. 179, 52 N. Y. Supp. 908.

Certiorari will lie to review the decision of a board of commissioners consenting to the discontinuance of a station, such consent being a judicial act. *People v. Board*, 158 N. Y. 421, 53 N. E. 163.

⁸⁷ *Meads v. Belt Copper Mines*, 125 Mich. 456, 84 N. W. 615.

⁸⁸ *State v. Harrison*, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867. It does not lie to annul proceedings of a board before it has made the final order in the matter. *In re Gauld*, 122 Cal. 18, 54 Pac. 272.

The action of a municipal board of health in determining a nuisance and ordering its abatement cannot be reviewed on certiorari. *Hartman v. Wilmington*, 1 Marv. (Del.) 215, 41 Atl. 74.

⁸⁹ *Dwight v. City Council*, 4 Gray (Mass.) 107. See *Fredericks v. Hoffmeister*, 62 N. J. Law, 565, 41 Atl. 722; *People v. Shaw*, 34 App. Div. 61, 54 N. Y. Supp. 218.

⁹⁰ *Wilson v. Seattle*, 2 Wash. St. 543, 27 Pac. 474; *People v. Cheritree*, 4 Thomp. & C. (N. Y.) 289; *People v. Gilon*, 56 Hun, 641, 9 N. Y. Supp. 212; *Moore v. Perry*, 119 Iowa, 423, 93 N. W. 510.

COMPLAINANT IN CHANCERY.

- 181. A municipality may also resort to the court of chancery for the protection or enforcement of any equitable right or title or the use of any equitable remedy appropriate for its relief.**

Equity as well as law lends its aid to municipal corporations in cases "wherein the law, by reason of its universality, is deficient"; and so in America the courts of chancery in those states where such tribunals survive, and, where they have succumbed to modernization, the courts clothed with equity jurisdiction will entertain the complaint of any municipality, and give it equitable remedy, wherever its equitable titles or rights have been denied, or it has suffered wrong for which the law affords no appropriate or sufficient remedy.⁹¹ If a municipality is trustee or cestui que trust in a trust estate; if it hold a lien on or an interest in property, by mortgage or otherwise; if constructive or resulting trust may be implied in its favor; if it have suffered or is likely to suffer loss from accident, mistake, or fraud; if it be entitled to the specific performance, reformation, or rescission of a contract; if it may demand of others exoneration, subrogation, marshaling, accounting, contribution, or needs the protecting aid of the puissant writ of injunction, it may go into equity and claim relief upon the same terms and conditions as any other corporation or person.⁹²

⁹¹ Eaton, Eq. pp. 16-18; *Folley v. Passaic*, 26 N. J. Eq. 216; *State v. Jersey City*, 30 N. J. Law, 148. Cf. *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

⁹² *GIRARD v. CITY OF PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed. 53 (trust); *Town of Essex v. Day*, 52 Conn. 483, 1 Atl. 620 (bonds); *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900; *Handley v. Palmer* (C. C.) 91 Fed. 948; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Chambers v. St. Louis*, 29 Mo. 543 (trust); *McInerney v. Reed*, 23 Iowa, 410 (lien); *New Haven v. Railroad Co.*, 38 Conn. 422, 9 Am. Rep. 399 (lien); *Bryant's Lessee v. McCandless*, 7 Ohio, pt. 2, 135.

Instances.

It has accordingly been held that the corporation may have relief in equity against illegal, unauthorized, or fraudulent acts of its officers;⁹³ that it may enjoin a person from carrying on a licensed business until he has paid the license fee;⁹⁴ that equity will enforce a tax lien in favor of a municipality;⁹⁵ that it will reform municipal bonds in the hands of holders with notice;⁹⁶ and that it will control a municipality in the execution of a trust committed to it for charitable purposes,⁹⁷ and may, if rendered necessary by the dissolution of a municipal corporation acting as such trustee, appoint its successor to that position.⁹⁸

⁹³ *Russell v. Tate*, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193; *Roper v. McWhorter*, 77 Va. 214; *Payne v. English*, 79 Cal. 540, 21 Pac. 952; *Clapp v. Spokane (C. C.)* 53 Fed. 515.

⁹⁴ *City of New Orleans v. Becker*, 31 La. Ann. 644.

⁹⁵ *McInerny v. Reed*, 23 Iowa, 410; *City of New Haven v. Railroad Co.*, 38 Conn. 422, 9 Am. Rep. 399.

⁹⁶ *Town of Essex v. Day*, 52 Conn. 483, 1 Atl. 620.

⁹⁷ In *Vidal v. Girard's Ex'rs* (1844) 2 How. (U. S.) 127, 11 L. Ed. 205, the court said: "Where a corporation [municipal] has this power [to take real and personal estate by deed and also by devise], it may also take and hold property in trust in the same manner and to the same extent that a private person may do. If the trust be repugnant to or inconsistent with the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust."

⁹⁸ Neither the identity of a municipal corporation nor its right to hold property devised to it is destroyed by a change of name or an enlargement of its area. *GIRARD v. PHILADELPHIA*, 7 Wall. (U. S.) 1, 19 L. Ed. 53.

DEFENDANT IN CHANCERY.

182. Chancery will also grant equitable relief against a municipality whenever there is no adequate and unembarrassed remedy at law for the injury complained of; or to prevent a multiplicity of suits.

When neither the common-law actions nor the extraordinary remedies treated in this chapter can furnish adequate redress for wrong done or threatened by a municipality, the injured party may confidently appeal to equity for relief. "Generally speaking, equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in cases between other suitors. For the reason that these corporations are intrusted for defined objects, or for public purposes, with large powers, the courts have evinced some anxiety not to allow their authority to be used to oppress the inhabitants within their jurisdiction; and it may safely be affirmed that there is a remedy, according to the nature of the case, by certiorari, mandamus, quo warranto, prohibition, appeal, indictment, civil action, or in equity, for all injurious abuses of power and all invasions of the legal rights of persons subjected to municipal control or affected by municipal action."⁹⁹ The grounds of equitable jurisdiction have been adverted to in the preceding section, and upon any of them a creditor, taxpayer, contractor, or other person suffering an injury from a municipality relievable in equity may have the aid of its process and jurisprudence in the attainment of justice.¹⁰⁰

⁹⁹ 2 Dill. Mun. Corp. § 908.

¹⁰⁰ One or more of the taxpayers of a city may sue to enjoin ultra vires of the city which may injure them as taxpayers. *City of Alpena v. Circuit Judge*, 97 Mich. 550, 56 N. W. 941.

But a bill in chancery against a municipal corporation to prevent a usurpation of power by the corporate authorities, or the violation of a duty imposed by law, may be filed by property holders or taxpayers. *New Orleans, M. & C. R. Co. v. Dunn*, 51 Ala. 128.

Dillon's Rules.

After an able and exhaustive consideration of the cases adjudged in the federal and state courts upon the right of taxpayers of a municipality to resort to a court of equity to prevent an illegal disposition of moneys of the corporation, or the illegal creation of a debt,¹⁰¹ Judge Dillon, with his wonted acumen, sets forth the following conclusions upon equitable jurisdiction in such cases: ¹⁰²

"(1) The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting ultra vires, or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant.¹⁰³ But if in these cases the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy.¹⁰⁴

"(2) That, in the absence of special controlling legislative provision, the proper public officer of the commonwealth which created the corporation and prescribed and limited its powers may, in his own name, or in the name of the state on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts.¹⁰⁵

¹⁰¹ *The Liberty Bell* (C. C.) 23 Fed. 843; *City of New London v. Brainard*, 22 Conn. 552; *City of Rock Island v. Huesing*, 25 Ill. App. 600; *Mitchell v. Wiles*, 59 Ind. 364.

¹⁰² 2 Dill. Mun. Corp. § 922.

¹⁰³ *Mayor, etc., of Baltimore v. Gill*, 31 Md. 375; *CITY OF VALPARAISO v. GARDNER*, 97 Ind. 1, 49 Am. Rep. 416; *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554.

¹⁰⁴ *Christie v. Melden*, 23 W. Va. 667.

¹⁰⁵ *People v. Lowber*, 28 Barb. (N. Y.) 65; *Bell v. Platteville*, 71 ING.CORP.—33

"(3) That the existence of such a power in the state or its proper public law officer is not inconsistent with the right of any taxable inhabitant to bring a bill to prevent the corporate authorities from transcending their lawful powers, where the effect will be to impose upon him an unlawful tax or to increase his burden of taxation.¹⁰⁶ Much more clearly may this be done when the right of the public officer of the state to interfere is not admitted, or does not exist; and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly."¹⁰⁷

Rule in New York.

From these conclusions the courts of New York dissent on the ground that private persons may not "assume to be champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts."¹⁰⁸

Wis. 139, 36 N. W. 831; *Steele v. Municipal Signal Co.*, 160 Mass. 36, 35 N. E. 105; *Baldwin v. Willbraham*, 140 Mass. 459, 4 N. E. 829; *KETCHUM v. BUFFALO*, 14 N. Y. 356.

¹⁰⁶ *Hodgman v. Chicago & St. P. Ry. Co.*, 20 Minn. 48 (Gil. 36); *Brockman v. Creston*, 79 Iowa. 587, 44 N. W. 822; *Lore v. Mayor*, 4 Del. Ch. 575; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Wood v. Draper*, 24 Barb. (N. Y.) 187, 4 Abb. Prac. 322.

¹⁰⁷ *City of Springfield v. Edwards*, 84 Ill. 626; *City of Grayville v. Gray*, 19 Ill. App. 120; *Kelly v. Mayor*, 53 Md. 134.

¹⁰⁸ *Roosevelt v. Draper*, 23 N. Y. 318. But this has since been changed by statute (1872, c. 161), and in this state a taxpayer may now maintain a suit in equity against a municipality for himself and all others in interest to enjoin an illegal contract. *Armstrong v. Grant*, 56 Hun, 226, 9 N. Y. Supp. 388; *Newton v. Keech*, 9 Hun. 355; *Metzger v. Railroad Co.*, 79 N. Y. 171; *Beebe v. Supervisors*, 64 Hun, 377, 19 N. Y. Supp. 629; *West v. Utica*, 71 Hun, 540, 24 N. Y. Supp. 1075.

Special Instances.

Upon other matters of equity it has been adjudged that equity will aid creditors of dissolved corporations to collect their debts from their successors;¹⁰⁹ will supply defects in municipal bonds resulting from the omission of the treasurer to countersign them;¹¹⁰ may relieve against a contractual forfeiture;¹¹¹ will relieve lot owners against an unfair contract for local improvement.¹¹²

INJUNCTIONS.

183. Injunction is generally recognized and used as an appropriate remedy to be invoked both for and against the municipality for the protection of public and private rights, when irremediable loss or damage is menaced.

Formerly the courts of equity were averse to the use of the process of injunction to arrest the operations of municipal government, upon the ground that such drastic measures better befitted the courts of law, and that interference in governmental matters was not an appropriate function of equity. The reckless abuse of municipal power during the last half century, and the confusion of jurisdiction under the reform procedure, as well as the general tendency throughout the United States towards a relaxation of the old rules of practice, have concurred to incline the courts generally to a more liberal use of this potent process in municipal affairs; and it is now more freely granted than formerly, not only against, but for, municipalities for the prevention of irreparable injury.¹¹³

¹⁰⁹ *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699.

¹¹⁰ *Melvin v. Lisenby*, 72 Ill. 63, 22 Am. Rep. 141.

¹¹¹ *Taylor v. Carondelet*, 22 Mo. 105. See *Maryland v. Railroad Co.*, 3 How. (U. S.) 534, 11 L. Ed. 714.

¹¹² *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205.

¹¹³ *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615, 36 Atl. 21; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

But it will not lie to control the action of public agents, such as a

Illustrations.

Injunctions have accordingly been granted in cases without number to restrain the collection of taxes tainted with fraud, or levied or assessed without authority of law;¹¹⁴ to prevent the issuance or delivery of municipal bonds invalid for like reasons;¹¹⁵ to forbid the appropriation of corporate funds to objects unlawful or ultra vires;¹¹⁶ to prevent the making of

state board of arbitration, acting under legislative authority, unless irreparable injury is apparent. *New Orleans City & L. R. Co. v. Board*, 47 La. Ann. 874, 17 South. 418. See *Potts v. Philadelphia*, 23 Pa. Co. Ct. R. 212; *Borough of Shamokin v. Railway Co.*, 196 Pa. 166, 46 Atl. 382.

¹¹⁴ *Winkler v. Halstead*, 36 Mo. App. 25; *International Trading Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S. W. 136; *Fine v. Stuart* (Tenn.) 48 S. W. 371.

Equity may, by injunction, stay the collection of a tax when the law has conferred no authority to levy the tax, or where a person or officer not authorized by law to exercise such a power levies a tax, or when the proper persons make the levy for purposes on the face of the levy not authorized, or for fraudulent purposes. *Town of Ottawa v. Walker*, 21 Ill. 605, 74 Am. Dec. 121.

¹¹⁵ *Town of Clarksdale v. Broadus*, 77 Miss. 667, 28 South. 954; *Town of Winamac v. Huddleston*, 132 Ind. 217, 31 N. E. 561; *Hodgman v. Railway Co.*, 20 Minn. 48 (Gil. 36); *Lynch v. Railway Co.*, 57 Wis. 430, 15 N. W. 743, 843. But not on the ground that the proceeds will pass into unauthorized hands. *City of Tampa v. Salomonson*, 35 Fla. 446, 17 South. 581; *Dunbar v. Commissioners*, 5 Idaho, 407, 49 Pac. 400; *Board of Com'rs of Owen Co. v. Spangler*, 159 Ind. 575, 65 N. E. 743.

¹¹⁶ Injunction will lie at the instance of a taxpayer to prevent the execution of a contract for public improvements stipulating that the contractor shall employ none but union labor. *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222; *Webster v. Douglas Co.*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; *Murphy v. East Portland (C. C.)* 42 Fed. 308; *The Liberty Bell (C. C.)* 23 Fed. 843; *Mitchell v. Wiles*, 59 Ind. 364; *Brockman v. Creston*, 79 Iowa, 587, 44 N. W. 822.

Where the municipal corporation appropriates money, contrary to authority, to be expended in the celebration of Independence Day, injunction by taxpayers against the city and its treasurer is the appropriate remedy. *City of New London v. Brainard*, 22 Conn. 552;

illegal contracts;¹¹⁷ to restrain a tax sale and a void local assessment;¹¹⁸ to prevent a change of street grade until the abutter's damages have been ascertained and paid;¹¹⁹ to restrain the perversion of a public square to purposes inconsistent with the dedication;¹²⁰ to prevent the closing of a public street;¹²¹ to enjoin trades or occupations which are intrinsically nuisances;¹²² and to aid in the abatement or prevention of other public nuisance.¹²³

Yarnell v. Los Angeles, 87 Cal. 603, 25 Pac. 767; *Harney v. Railroad Co.*, 32 Ind. 244; *City of Rock Island v. Huesing*, 25 Ill. App. 600; *Id.*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; *Wade v. Richmond*, 18 Grat. (Va.) 583; *Bayle v. New Orleans (C. C.)* 23 Fed. 843; *Simmons v. Toledo*, 5 Ohio Cir. Ct. R. 124. See *Miller v. Bowers*, 30 Ind. App. 116, 65 N. E. 559; *Board v. Territory*, 12 Okl. 286, 70 Pac. 792.

¹¹⁷ *City of New London v. Brainard*, 22 Conn. 532; *Yarnell v. Los Angeles*, 87 Cal. 603, 25 Pac. 767; *Armstrong v. Grant*, 56 Hun, 226, 9 N. Y. Supp. 388; *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080; *Akron v. France*, 24 Ohio Cir. Ct. R. 63; *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128; *Id.*, 93 N. W. 747.

¹¹⁸ *Holland v. Mayor*, 11 Md. 186, 69 Am. Dec. 195; *Landon v. City of Syracuse*, 163 N. Y. 562, 57 N. E. 1114.

¹¹⁹ *Hurford v. Omaha*, 4 Neb. 336. Injunction is the proper remedy to restrain a town from opening a street through a person's land, without first condemning it pursuant to law. *Yates v. West Grafton*, 33 W. Va. 508, 11 S. E. 8. See *Village of Itasca v. Schroeder*, 182 Ill. 192, 53 N. E. 50.

¹²⁰ *Village of Princeville v. Auten*, 77 Ill. 325; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *City of Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318, 45 Atl. 129; *Sturmer v. Co. Ct.*, 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

¹²¹ *Hesing v. Scott*, 107 Ill. 600.

¹²² *Rounsaville v. Kohlhelm (stable)* 68 Ga. 668, 45 Am. Rep. 505; *Ashbrook v. Commonwealth (cattle pens)* 1 Bush (Ky.) 139, 89 Am. Dec. 616; *Ross v. Butler (Cinders)* 19 N. J. Eq. 294, 97 Am. Dec. 654; *Catlin v. Valentine (slaughter-house)* 9 Paige, 575, 38 Am. Dec. 567; *Bishop v. Banks (bleating calves)* 33 Conn. 118, 87 Am. Dec. 197; *Coker v. Birge (stable)* 9 Ga. 425, 54 Am. Dec. 347.

¹²³ *City of Huron v. Bank*, 8 S. D. 449, 66 N. W. 815, 59 Am. St. Rep. 769; *City of Belton v. Central Hotel Co. (Tex. Civ. App.)*

CRIMINAL PROSECUTION.

184. A municipality is indictable at common law for nonfeasance or misfeasance in respect of public duties imposed upon it by statute.

This doctrine has received repeated recognition in the English courts, where it is so extended as to include prescriptive as well as statutory duties; but in America indictments against municipal corporations have been confined to statutory offenses.¹²⁴ The duty may be enjoined in the charter or imposed by general statute.¹²⁵ A municipality is not indictable for a felony, since it is incapable of felonious intent, and can neither be hanged nor imprisoned;¹²⁶ nor, indeed, can it be guilty of any misdemeanor of which *mala mens* is an essential ingredient.¹²⁷ It is obvious, however, that for nonfeasance of a public duty a municipality may be guilty of a misdemeanor;¹²⁸ and it may also be indicted for misfeasance in creating a public nuisance;¹²⁹ and for the performance of other acts forbidden by law which work harm and annoyance to the public.¹³⁰ It has accordingly been held that a municipality is indictable for unlawfully obstructing a public highway;¹³¹

33 S. W. 297; *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; *Sammons v. Gloversville*, 34 Misc. Rep. 459, 70 N. Y. Supp. 284.

¹²⁴ *McClain*, Cr. Law, § 182; 2 Dill. Mun. Corp. § 932.

¹²⁵ *HILL v. BOSTON*, 122 Mass. 344, 23 Am. Rep. 332; *PEOPLE v. ALBANY CORP.*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *WILD v. PATERSON*, 47 N. J. Law, 406, 1 Atl. 490.

¹²⁶ 1 Bouv. Law. Dict. tit. "Felony."

¹²⁷ *State v. Agricultural Soc.*, 54 N. J. Law, 260, 23 Atl. 680.

¹²⁸ *State v. Mayor*, 3 Head (Tenn.) 263; *Mayor, etc., of Town of Chattanooga v. State*, 5 Sneed (Tenn.) 578.

¹²⁹ *PEOPLE v. ALBANY CORP.*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *Commonwealth v. Gloucester*, 110 Mass. 491.

¹³⁰ *State v. Barksdale*, 5 Humph. (Tenn.) 154.

¹³¹ *State v. Mayor*, 3 Head (Tenn.) 264; *State v. Dover*, 46 N. H. 452.

also for neglecting its duty to keep its streets in reasonable repair;¹³² and in Tennessee, and perhaps some other states, a municipality is indictable for permitting a public nuisance, such as a slaughter house,¹³³ which annoys the inhabitants and endangers public health. The same doctrine is also held in some states with regard to public sewers.¹³⁴ Municipalities have also been held indictable for neglect to erect a bridge pursuant to law imposing the duty,¹³⁵ and also for neglecting to keep municipal bridges in repair;¹³⁶ and in some states for neglecting to keep in repair bridges and abutments erected by railroad companies over their tracks where they cross the public streets.¹³⁷ Modern judicial tendency, like public sentiment, is towards assimilating corporations to natural persons in their liabilities, civil and criminal. This tendency finds apt expression in the following words of a Massachusetts judge: "Cor-

¹³² *State v. Mayor*, 11 Humph. (Tenn.) 216; *Mayor, etc., of Town of Chattanooga v. State*, supra; *Commonwealth v. Trustees*, 7 B. Mon. (Ky.) 38; *Davis v. Bangor*, 42 Me. 41; *Commonwealth v. Boston*, 16 Pick. (Mass.) 442.

¹³³ *State v. Shelbyville Corp.*, 4 Sneed (Tenn.) 176.

The city of Albany was held indictable for neglect to do what the common good required, where it was authorized to direct the excavating, deepening, or cleansing of a basin connected with a river, so that it became fouled by the aggregation of mud and other substances, whereby a nuisance was created. *PEOPLE v. ALBANY CORP.*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

¹³⁴ A borough on which is imposed the duty of making regulations necessary for the health and cleanliness of the borough may be indicted for permitting its sewers to become a public nuisance. *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921.

Contra, *Georgetown v. Commonwealth*, 24 Ky. Law Rep. 2285, 73 S. W. 1011, 61 L. R. A. 673.

¹³⁵ *State v. Whittingham*, 7 Vt. 390; *State v. Madison*, 63 Me. 546; *State v. Hudson Co.*, 30 N. J. Law, 137.

¹³⁶ *PEOPLE v. ALBANY CORP.*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *RUSSELL v. MEN OF DEVON*, 2 Term R. 667; *Thomas v. Sorrell*, Vaughan, 380.

¹³⁷ *State v. Gorham*, 37 Me. 457; *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

porations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason, or felony, or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them." ¹⁸⁸

¹⁸⁸ *Commonwealth v. Bridge Proprietors*, 2 Gray (Mass.) 339.

Part III.

QUASI PUBLIC CORPORATIONS.

CHAPTER XX.

QUASI PUBLIC CORPORATIONS.

- 185. Nature and Extent.
- 186. Are Essentially Private Corporations.
- 187. Subject to Public Regulation and Control.
- 188. Legislative Control.
- 189. Objects and Limits of Regulation.

NATURE AND EXTENT.

- 185. Private corporations endowed with sovereign power, performing public functions, rendering public service, or operating under municipal franchises, are commonly called quasi public corporations.**

Notwithstanding just criticism of the propriety of this title by various authors and judges, and their warning prophesy that it would soon fall into disuse, the term "quasi public corporation," which came into frequent use during the last century, still survives, and, for lack of a more appropriate and acceptable substitute, so persists in holding recognition as to be regarded as a fixture in our legal nomenclature. It describes to the professional mind a class of corporations steadily increasing in number and variety, which are not wholly either public or private, and therefore not governed exclusively by the law of private corporations or the law of public corporations. The object of the quasi public corporation is profit-making. It is a stock corporation voluntarily organized by its corporators. Its governing body is a meeting of stockholders. Its affairs are managed by a board of directors chosen by the stockholders. It has all the powers, properties, and incidents pertaining to a private corporation, and transacts its business like other private corporations. But because its business is of a public nature, because it performs public functions, and therefore owes duties to the public, it is usually en-

dowed with the sovereign power of eminent domain. Such corporations are universally recognized as forming a distinct class of private corporations, but because of their public powers and service are commonly designated quasi public corporations.¹ In *Crumley v. Watauga Water Co.*,² Judge Caldwell, of the Supreme Court of Tennessee, thus speaks of this class of corporations: "They are exceptions to the general rule that a person engaged in business may, at his election, and without good reason, refuse to deal with some other person. These exceptions embrace innkeepers, common carriers, bridge companies, turnpike companies, telegraph companies, telephone companies, gas companies, electric light companies, and water companies, and are based upon the public nature of the business done by such persons. Being engaged in public business under public grants, they are charged with public duties." Proceeding further, he describes them as "public corporations, as contradistinguished from private corporations." This contradistinction is the idea embodied in the phrase "quasi public," which we use to designate this particular class of corporations.

¹ Ante, § 2. 1 *Thomp. Priv. Corp.* § 22; *Elliott, Priv. Corp.* §§ 14, 91; 1 *Beach, Pub. Corp.* § 2; *Marsh. Corp.* pp. 49, 361; 2 *Cooke. Stock, Stockh. & Corp. Law*, § 891; *Black v. Canal Co.*, 24 N. J. Eq. 455; *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *CHICAGO, B. & Q. R. CO. v. IOWA*, 94 U. S. 161, 24 L. Ed. 94; *Spring Valley Water Works v. Schottler*, 110 U. S. 354, 4 Sup. Ct. 48, 28 L. Ed. 173; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *MINERS' DITCH CO. v. ZELLERBACH*, 37 Cal. 543, 99 Am. Dec. 300; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *West Branch Boom Co. v. Land Co.*, 121 Pa. 143, 15 Atl. 509, 6 Am. St. Rep. 766; *Tinsman v. Railroad Co.*, 26 N. J. Law, 148, 69 Am. Dec. 565; *Whiting v. Railroad Co.*, 25 Wis. 167, 3 Am. Rep. 30; *State v. Gas Co.*, 37 Ohio St. 45; *Rogers Park Water Co. v. Fergus (Ill.)*, 69 Am. St. Rep. 315, note; *CITY OF KNOXVILLE v. WATER CO.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *Id.*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887.

² 99 Tenn. 240, 41 S. W. 1058.

What Classes Included.

Private corporations have been judicially declared to be quasi public which were of the nature and for the objects expressed by the list following: Railroads;³ street railways;⁴ canals;⁵ turnpikes;⁶ bridges;⁷ ferries;⁸ navigation companies;⁹ telegraphs;¹⁰ telephones;¹¹ electric light and power

³ *California v. Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Louisville, C. & C. R. Co. v. Chappell*, Rice (S. C.) 383; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448.

⁴ *Kellinger v. Railroad Co.*, 50 N. Y. 206; *Elliott v. Railroad Co.*, 32 Conn. 579; *Hiss v. Railroad Co.*, 52 Md. 242, 36 Am. Rep. 371; *STANLEY v. DAVENPORT*, 54 Iowa, 463, 2 N. W. 1064, 37 Am. Rep. 216; *Texas & P. Ry. Co. v. Railway Co.*, 64 Tex. 80, 53 Am. Rep. 739.

⁵ *Chesapeake & O. Canal Co. v. Key*, 3 Cranch (C. C.) 599, Fed. Cas. No. 2,649; *Ten Eyck v. Canal Co.*, 18 N. J. Law, 200, 37 Am. Dec. 233.

⁶ *Mitchell v. Burlington*, 4 Wall. (U. S.) 270, 18 L. Ed. 350; *Knox Co. v. Kennedy*, 92 Tenn. 1, 20 S. W. 311; *Hadley v. Turnpike Co.*, 2 Humph. (Tenn.) 555; *Parker v. New Brunswick*, 30 N. J. Law, 395.

⁷ *In re Towanda Bridge Co.*, 91 Pa. 216; *Arnold v. Bridge Co.*, 1 Duv. (Ky.) 372. Cf. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773.

⁸ *Burlington & Henderson County Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390; *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872.

⁹ *Lancaster v. Kennebec Co.*, 62 Me. 272; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53.

¹⁰ *Reed v. Telegraph Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *MARR v. TELEGRAPH CO.*, 85 Tenn. 529, 3 S. W. 496; *PINCKNEY v. TELEGRAPH CO.*, 19 S. C. 71, 45 Am. Rep. 765; *Western Union Telegraph Co. v. Griswold*, 37 Ohio St. 302, 41 Am. Rep. 500; *Western Union Tel. Co. v. Bierhaus*, 8 Ind. App. 563, 36 N. E. 161; *Western Union Tel. Co. v. Neill*, 57 Tex. 233, 44 Am. Rep. 589; *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344.

¹¹ *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Irwin v. Telephone Co.*, 37 La. Ann. 63; *Telephone Tel. Co. v. Forke*, 2 Willson, Civ. Cas. Ct. App. § 367; *Chesapeake & P. Telegraph Co. v. Telegraph Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *York Telegraph Co. v. Keesey*, 5 Pa. Dist. R. 366.

Where a telephone company refuses to supply all in similar cir-

companies;¹² gas companies;¹³ water companies;¹⁴ sewer companies;¹⁵ pipe lines;¹⁶ grist mills;¹⁷ grain elevators;¹⁸ mining companies;¹⁹ irrigation companies;²⁰ swamp drain-

cumstances with similar facilities without discrimination, it may be compelled to do so. *State v. Telegraph Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870.

¹² *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Tuttle v. Illuminating Co.*, 50 N. Y. Super. Ct. 464; *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 34 S. W. 51, 34 L. R. A. 369, 56 Am. St. Rep. 515; *Levis v. Newton* (C. C.) 75 Fed. 884.

¹³ *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. Law Rep. 983, 42 S. W. 351; *State v. Gaslight Co.*, 34 Ohio St. 572, 32 Am. Rep. 390; *Bloomfield & R. Natural Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Jefferson City Gaslight Co. v. Clark*, 95 U. S. 644, 24 L. Ed. 521.

¹⁴ *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *CITY OF KNOXVILLE v. WATER CO.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *Id.*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

¹⁵ For legislation creating such quasi corporations, see Rev. St. Ohio, § 3871; Sess. Laws S. D. 1890, c. 37, art. 5, §§ 10-21; Gen. St. Kan. §§ 1156, 1159, 1454.

¹⁶ *West Virginia Transp. Co. v. Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

¹⁷ *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457; *Burlington Tp. v. Beasley*, 94 U. S. 310, 24 L. Ed. 161. But see *Osborne v. Adams County*, 106 U. S. 181, 1 Sup. Ct. 168, 27 L. Ed. 129; *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235, 73 S. W. 496.

¹⁸ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77.

¹⁹ *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 394; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419. But see *Salt Co. v. Brown*, 7 W. Va. 191; *Appeal of Edgewood R. Co.*, 79 Pa. 257.

²⁰ *Slosser v. Canal Co. (Ariz.)* 65 Pac. 332; *Wheeler v. Irrigation Co.*, 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; *Combs v. Ditch Co.*, 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275; *Price v. Irrigating Co.*, 56 Cal. 431.

ing;²¹ boom companies;²² levee companies;²³ and the like.²⁴ This list is not intended to be exhaustive, though it contains many companies which were not recognized as quasi public corporations, and were even unknown, a few decades ago. Others are being added to it as American ingenuity rapidly increases the agencies and appliances for serving the public; and the same reasoning which makes a grain elevator a quasi public corporation seems equally applicable to certain cotton compress companies, stock yards, and slaughter houses. Certain it is that legislatures and courts are influenced by the public demand for regulation of all those corporations which exercise public functions and owe duties to the public. But it is not to be understood that all corporations included in the above list are necessarily quasi public. With the rare exception of highway companies, any of those in the foregoing list may be, when used only for private purposes, strictly private corporations, and therefore not subject to public regulation, nor entitled to public powers or franchises. It is of these companies only when serving, and to the extent that they serve, the public, that we shall treat in the following pages; for it is then only, and only so far forth, that they are quasi public corporations.

²¹ *Anderson v. Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

²² *Weaver v. Boom Co.*, 28 Minn. 534, 11 N. W. 114; *Lawler v. Boom Co.*, 56 Me. 443; *Patterson v. Boom Co.*, 3 Dill. (U. S.) 465, Fed. Cas. No. 10,829.

²³ *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318.

²⁴ *Louisville & N. R. Co. v. Commonwealth*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298; public cemeteries, see *Edwards v. Cemetery Ass'n*, 20 Conn. 466; *Balch v. Commissioners*, 103 Mass. 106; stock-yards, *Cotting v. Stock Yards Co.* (C. C.) 79 Fed. 684; *Sexton v. Transit Co.*, 200 Ill. 244, 65 N. E. 638.

ESSENTIALLY PRIVATE CORPORATIONS.

- 186. Quasi public corporations, being created for the primary purpose of private profit for their members, have the same powers, privileges, and constitutional protection as other private corporations in their organization, self-government, business management, and other ordinary relations and operations.**

Within the limits of its charter powers, the quasi public corporation has continuous succession, may contract, hold property, raise stock and issue shares, declare dividends, and receive grants of privileges and immunities.²⁵ Its members, as distinct individuals, are exempt from personal liability for the corporate debts, and its charter is a contract with the state, protected by the federal Constitution.²⁶ Like any other private corporation, it may engage in any business and exercise any powers within the scope of its charter. Its stockholders in annual meeting assembled choose its board of directors to have the general management of all its affairs, enact by-laws for internal government, and decide upon general lines of policy to be pursued by the corporation.²⁷ It is subject to dissolution for the same causes and by the same proceeding as any other private corporation, and its assets are thereupon applied first to the discharge of its liabilities, and the remainder is divided pro rata among the shareholders. It may not only sue for injuries sustained, but is liable to action of tort as well as contract, like any natural person.²⁸ In short, a quasi public corporation has all the attributes and incidents of a private corporation, and enjoys in general the same measure of legal

²⁵ Clark, Priv. Corp. § 6; *THORPE v. RAILROAD CO.*, 27 Vt. 140, 62 Am. Dec. 625.

²⁶ Clark, Priv. Corp. § 7; *Western North Carolina R. Co. v. Rollins*, 82 N. C. 523; *Washington & B. Turnpike Co. v. Maryland*, 3 Wall. (U. S.) 210, 18 L. Ed. 180.

²⁷ Clark, Priv. Corp. § 182.

²⁸ *Nugent v. Railroad*, 80 Me. 62, 12 Atl. 797, 60 Am. St. Rep. 151.

constitutional protection for itself and its members as ordinary private corporations.²⁹

SUBJECT TO PUBLIC REGULATION AND CONTROL.

187. Quasi public corporations, because of their public powers, franchises, functions, and duties, are subject to public regulation and control in the exercise and performance thereof, to the end that public interests may be protected, and the public welfare promoted.

Power and privilege imply duty and service. Duty and service require compulsion and supervision. Noblesse oblige applies in law as in morals; "for unto whomsoever much is given, of him much shall be required." Power and duty are correlative. When, therefore, the state creates a corporation, and endows it with powers, franchises, and privileges, it expects a return for the favors thus granted; and the return should be in proportion to the favor. If the favor is forgotten or ignored, and just return refused, the state should have power to compel performance of its just requirements.

Attitude of Private Corporations.

Formerly charters were grudgingly granted in America to private corporations. "Equal rights to all; special privileges to none," was the popular political maxim, and courts declared that no charter ought ever to be granted to a private corporation except for reciprocal benefit.³⁰ The theory still exists; but practice, unhitched, has left it in the highway far behind. Private profit, rather than public welfare, is the primary object of the modern private corporation.³¹ The public

²⁹ Louisville & N. R. Co. v. Commonwealth, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298; Tinsman v. Railroad Co., 26 N. J. Law, 148, 69 Am. Dec. 565; THORPE v. RAILROAD CO., 27 Vt. 140, 62 Am. Dec. 625; Cotting v. Stock Yards Co., 183 U. S. 80, 22 Sup. Ct. 30, 46 L. Ed. 92; MINERS' DITCH CO. v. ZELLERBACH, 37 Cal. 543, 99 Am. Dec. 300.

³⁰ Ante, § 4.

³¹ Mor. Priv. Corp. §§ 8, 4.

benefit is purely incidental, and often imperceptible. Such is the ordinary private corporation of these times; and naturally it avoids inspection, defends secrecy, and defies regulation.³²

Visitation of Quasi Public Corporations.

Quasi public corporations, however, though private, occupy a different relation to the public. They perform public functions, such as that of common carrier, and therefore owe duties to the public. Most of them, if not all, are clothed with the power of eminent domain—a sovereign attribute—whereby they may compel other persons and corporations unwillingly to yield their rights and properties to them for lawful consideration. They may take lands, rights, and franchises of others for their corporate use. The state grants them this sovereign right and power, not because they are corporations, but because they serve the public;³³ and the property thus taken is thereby appropriated not to corporate, but public uses. Only this public use warrants the grant of this sovereign power; and, the corporation having this public power, exercising a public function, charged with a public duty, owes to the public faithful performance upon reasonable terms, and at moderate rates.³⁴ To protect the public interests and promote the public welfare, to insure the performance of public duties, the state retains compulsory power. The grant of franchises, powers, and privileges to such a private corpora-

³² Mr. Justice Brewer's Commencement Address, Yale Law School, 1904.

³³ *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. Ed. 382; *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Eldridge v. Smith*, 34 Vt. 484; *Huelsenkamp v. Railway Co.*, 37 Mo. 537, 90 Am. Dec. 399.

³⁴ *Pelk v. Railway Co.*, 94 U. S. 164, 24 L. Ed. 97; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *State v. Railway Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; *Cotting v. Stockyards Co.*, 183 U. S. 90, 22 Sup. Ct. 30, 46 L. Ed. 92; *SMYTH v. AMES*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

tion is always subject to the paramount power and duty of the state to protect the public interests and promote the public welfare.³⁵ Though not identical with, it is similar to, the power of visitation, inherent in the founder of ecclesiastical and eleemosynary corporations at common law.³⁶ It has the same moral basis, is founded upon a valuable consideration, and rests securely upon the legal maxim, "Salus populi est suprema lex." All quasi public corporations, therefore, whatsoever may be their private privileges and powers, and the protection vouchsafed to them by constitutional guaranty and prohibition, are subject to state visitation, inspection, and regulation, because and to the extent that they are public servants and agencies exercising public functions and powers and owing public duties and obligations.³⁷

³⁵ *Commonwealth v. Warwick*, 185 Pa. 623, 40 Atl. 93; *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY*, 174 U. S. 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Inhabitants of Town of Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *White's Creek Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 396; *STONE v. MISSISSIPPI*, 101 U. S. 814, 25 L. Ed. 1079; *BOSTON BEER CO. v. MASSACHUSETTS*, 97 U. S. 25, 24 L. Ed. 989; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; *Stein v. Supply Co. (C. C.)* 34 Fed. 145.

³⁶ 1 Bl. Comm. 280; 2 Kyd, Corp. 174; 2 Kent, Comm. 240.

³⁷ *THORPE v. RAILROAD CO.*, 27 Vt. 140, 62 Am. Dec. 625; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *O'Connor v. Pittsburgh*, 18 Pa. 189; *James River & Kanawha Co. v. Anderson*, 12 Leigh (Va.) 286; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Grand Rapids, E. L. & P. Co. v. Electric Co. (C. C.)* 33 Fed. 659.

LEGISLATIVE CONTROL.

- 188. The regulation and control of quasi public corporations may be effected directly or indirectly by the legislative or judicial powers of the government in the appropriate exercise of their respective functions.**

The control of quasi public corporations by the state cannot be arbitrary or capricious, but, under well-recognized rules, must be lawful and reasonable.³⁸ The right of the state thus to interfere in the business of a private corporation is often referred to the police power. This power, though indefinable and of doubtful limitation, is inherent in every state, and may not be abridged, bartered, donated, or in any other way aliened by it.³⁹ It is a governmental power, to be exercised always in the first instance by the legislature. This branch of the government decides upon the public necessity for regulation, and, having made its determination, enacts legislation appropriate to the end in view.⁴⁰ Generally, the legislature exercises this power itself in the enactment of

³⁸ *Chester v. Traction Co.*, 5 Pa. Dist. R. 609; *New Memphis Gas & Light Co. v. Memphis (C. C.)* 72 Fed. 952; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Spring Valley Waterworks v. San Francisco (C. C.)* 124 Fed. 598; *State v. Addington*, 77 Mo. 110.

³⁹ *Cooley, Const. Lim.* (6th Ed.) 704; *State v. Noyes*, 47 Me. 189; *Town of Lake View v. Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *THORPE v. RAILROAD CO.*, 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *BOSTON BEER CO. v. MASSACHUSETTS*, 97 U. S. 25, 24 L. Ed. 989; *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302; *STONE v. MISSISSIPPI*, 101 U. S. 814, 25 L. Ed. 1079.

⁴⁰ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *Peik v. Railroad Co.*, 94 U. S. 178, 24 L. Ed. 97; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176.

laws enjoining helpful and prohibiting harmful measures for the public good. But, as we have heretofore seen,⁴¹ the police power is usually delegated in some measure to municipal corporations. These bodies thus authorized may enact ordinances controlling the operation of quasi public corporations within their respective limits; and thus the legislature, either directly or indirectly, by general or local regulation, may control and regulate the operations of quasi public corporations in the limits of the state and the respective municipalities thereof. In this way quasi public corporations may be compelled by laws passed after their organization to so conduct their business as not unnecessarily to expose the public to harm or danger,⁴² or to impose unreasonable burdens upon the public in the charges made for service to them.⁴³

The Judicial Function.

The courts also may render important service in the matter of state control of quasi public corporations. If the regulation requires inspection of the internal affairs of the corpora-

⁴¹ Ante, § 116. See, also, *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. 618, 36 C. C. A. 423; *Cape May, D. B. & S. P. R. Co. v. Cape May*, 59 N. J. Law, 404, 36 Atl. 678, 36 L. R. A. 657.

⁴² *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 5 Am. Rep. 360; *Lyman v. Railroad Corp.*, 4 Cush. (Mass.) 288; *Rodemacher v. Railroad Co.*, 41 Iowa, 297, 20 Am. Rep. 592; *Horn v. Railroad Co.*, 38 Wis. 463; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Railroad Com'rs v. Railroad Co.*, 63 Me. 269, 18 Am. Rep. 208; *Detroit, Ft. W. & B. I. Ry. v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860.

⁴³ *People v. Railway Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *CITY OF KNOXVILLE v. WATER CO.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *Id.*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 177, 9 Sup. Ct. 47, 32 L. Ed. 377; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *Cotting v. Yards Co.*, 183 U. S. 90, 22 Sup. Ct. 30, 46 L. Ed. 92; *State v. Light Co.*, 34 Ohio St. 572, 32 Am. Rep. 390.

tion, this is usually effected through the process of the courts, which are the modern agencies employed by the state to exercise its power of visitation; ⁴⁴ and, if sufficient ground be disclosed therefor, if the corporation is acting unlawfully, the court may pronounce judgment of dissolution against it as against any other private corporation. ⁴⁵ But the courts do not possess the power of determining when or how such corporations shall be regulated and controlled. This is an exclusive function of the legislature; and it must determine not only when the public necessity exists for regulation, but the method to be employed, and the extent of the regulation. ⁴⁶ When the law of regulation has been duly enacted, then the court may be called upon to exercise its functions. It may not only employ its process, legal, equitable, and criminal, to enforce the law, but it may also, when the validity of the law is challenged, determine whether the regulation is reasonable. If it is made to appear plainly to the court that the regulating statute is unreasonable, the court may declare it void. ⁴⁷

⁴⁴ Angell & A. Priv. Corp. § 684; 2 Kent, Comm. 300; Wisconsin Keeley Institute Co. v. Milwaukee, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105; Swift v. Richardson, 7 Houst. (Del.) 338, 32 Atl. 143, 40 Am. St. Rep. 127; Commonwealth v. Iron Co., 105 Pa. 111, 51 Am. Rep. 184; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707.

⁴⁵ Clark, Priv. Corp. pp. 237-239.

⁴⁶ THORPE v. RAILROAD CO., 27 Vt. 141, 62 Am. Dec. 625; Bank of Republic v. Hamilton Co., 21 Ill. 53; Pearsall v. Railway Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; Commonwealth v. Railroad Co., 103 Mass. 254, 4 Am. Rep. 535; Blake v. Railroad Co., 19 Minn. 418 (Gil. 362), 18 Am. Rep. 345; State v. Johnson, 61 Kan. 808, 60 Pac. 1068, 49 L. R. A. 662.

⁴⁷ SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY, 174 U. S. 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; Cotting v. Yards Co., 183 U. S. 90, 22 Sup. Ct. 30, 46 L. Ed. 92; CHICAGO, M. & ST. P. R. CO. v. MINNESOTA, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Spring Valley Waterworks v. San Francisco (C. C.) 124 Fed. 598; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Steenerson v. Railway Co., 69 Minn. 353, 72 N. W. 713.

The courts, when the question is properly presented, may deter-

OBJECTS AND LIMITS OF REGULATION.

189. The objects of regulation of quasi public corporations are the protection of the public safety in life and property and the prevention of public extortion and imposition; and laws and ordinances obviously tending to effect such results are valid. But those statutes are invalid in which public regulation is a manifest pretext for meddlesome interference with corporate business, or which result in the confiscation of corporate property.

Statutes and ordinances have been upheld which require railway companies to fence their roads,⁴⁸ and to bridge highway crossings;⁴⁹ and also those requiring a conductor upon every street car;⁵⁰ also those which fix the prices to be charged for hauling freight and passengers,⁵¹ and for supplying water and gas to consumers.⁵²

mine whether or not the rates which have been established by statute or municipal ordinance are reasonable, but they have no power to fix such rates. *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 406.

The reasonableness of the rates fixed by law as maximum rates for gas companies is a matter for judicial determination. *Capital City Gas Co. v. Des Moines (C. C.)* 72 Fed. 818.

⁴⁸ *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *THORPE v. RAILROAD CO.*, 27 Vt. 141, 62 Am. Dec. 625.

So an ordinance requiring electric street cars to come to a full stop before crossing intersecting streets was held valid. *Cape May & D. B. & S. P. R. Co. v. Cape May*, 59 N. J. Law, 404, 36 Atl. 678, 36 L. R. A. 657.

⁴⁹ *New York & N. E. R. Co.'s Appeal from Railroad Com'rs*, 62 Conn. 527, 26 Atl. 122; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269.

⁵⁰ *State v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; *SOUTH COVINGTON & C. ST. RY. CO. v. BERRY*, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161.

⁵¹ *Georgia R. & Banking Co. v. Smith*, 128 U. S. 177, 9 Sup. Ct.

⁵² See note 52 on following page.

Police Power.

But the courts have also held that an ordinance requiring gates to be erected or guards stationed at every street crossing in a town is invalid;⁵³ and that a statute fixing a maximum price for freight or passengers at less than the actual cost of carriage, is, in effect, a statute of confiscation, and therefore unconstitutional and void.⁵⁴ Instances of the regulation of corporate conduct by legislation in the strict exercise of the police power for the preservation of public health and comfort and the protection of private property are too numerous for specification and consideration here. Many of them apply to strictly private corporations and to individuals as well

47, 32 L. Ed. 377; *Peik v. Railroad Co.*, 94 U. S. 178, 24 L. Ed. 97; *People v. Railroad Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *City of Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337.

⁵² *CITY OF KNOXVILLE v. WATER CO.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *Id.*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *State v. Light Co.*, 34 Ohio St. 572, 32 Am. Rep. 390.

It is the province of a legislative body to fix the rates to be charged for service rendered by a quasi public corporation, where its business is impressed with a public interest. *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 406; *Baily v. Gas-Fuel Co.*, 193 Pa. 175, 44 Atl. 251.

But a city council has no power to compel a gas company, without its assent to the ordinance, to furnish gas in a manner and at rates entirely at the option of the consumer. *Logan Natural Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122.

⁵³ *Toledo, W. & W. Ry. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

⁵⁴ *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Snyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *New Memphis Gas & Light Co. v. Memphis (C. C.)* 72 Fed. 932; *Indianapolis Gas Co. v. Indianapolis (C. C.)* 82 Fed. 245.

See, also, as to confiscation of the property of a water company by regulation of rates, *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 400, 62 Am. St. Rep. 261.

as to quasi public corporations.⁵⁵ Some of the class last mentioned will be referred to under appropriate heads hereafter. But the regulation of quasi public corporations in respect of their rates and charges, while sometimes referred to as an exercise of the police power, can only be so regarded when that phrase is used in its broadest and most comprehensive signification, under which the state may regulate all persons and property for the public welfare.⁵⁶

Sovereign Power.

But limitation of the rates and charges of quasi public corporations by legislation, though sometimes referred to by the courts as an exercise of the police power, is more properly referable to the sovereign power of the state to regulate and control all public affairs. The state may not say to any citizen with whom he shall deal, or at what price he shall sell; for this would interfere with his inherent liberty of action.⁵⁷ So, too, of a strictly private corporation, which in this particular enjoys the same freedom of trade.⁵⁸ But the quasi public corporation has assumed public functions and duties such as the state itself, if it chose, might exercise and perform, and therefore has voluntarily subjected itself to public regulation.⁵⁹

⁵⁵ *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535; *Ward v. Farwell*, 97 Ill. 593; *BOSTON BEER CO. v. MASSACHUSETTS*, 97 U. S. 26, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

⁵⁶ *Cooley*, Const. Lim. (6th Ed.) 705, 706. But where the conditions, regulations, and restrictions imposed are such as to evince a desire to oppress and control, and perhaps defeat, the company's existence, they cannot be supported as a lawful exercise of the police power. *City of Richmond v. Telegraph Co.*, 85 Fed. 19, 28 C. C. A. 659.

⁵⁷ *Baker v. Portland*, 5 Sawy. (U. S.) 566, Fed. Cas. No. 777; *Hamilton v. County Ct.*, 15 Mo. 13; *People v. Morris*, 13 Wend. (N. Y.) 325; *Cooley*, Const. Lim. (6th Ed.) 744, 745.

⁵⁸ *Joy v. Plank Road Co.*, 11 Mich. 164; *Treadwell v. Manufacturing Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490.

⁵⁹ *Chicago G. W. Ry. Co. v. People*, 79 Ill. App. 529; *People v.*

It must serve every one applying, unless excused therefrom by the law,⁶⁰ and at such reasonable rates as the state may prescribe.⁶¹

Reasonable Regulation.

The justices of the Supreme Court of the United States, in the course of their frequent consideration of the regulation of rates of quasi public corporations, have given utterance to the following rules for determining what is reasonable regulation: "What the company is entitled to ask is a fair return upon the value of that which it employs for public conven-

Budd, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559, 15 Am. St. Rep. 460; Munn v. People, 69 Ill. 80; MUNN v. ILLINOIS, 94 U. S. 113, 24 L. Ed. 77.

⁶⁰ COY v. GAS CO., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; CRUMLEY v. WATER CO., 99 Tenn. 420, 41 S. W. 1058; American Water Works Co. v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610; State v. Water Co., 18 Mont. 189, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. Rep. 574.

Where persons or corporations carry on a business which is public in its nature, and on which is impressed a public interest, they must serve all who apply on the same terms and at reasonable rates. People's Gaslight & Coke Co. v. Hale, 94 Ill. App. 406; Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. Law Rep. 983, 42 S. W. 351.

⁶¹ Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; People's Gaslight & Coke Co. v. Hale, supra; Cleveland City R. Co. v. Cleveland (C. C.) 94 Fed. 385; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. Ed. 636; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94.

A private corporation engaged in the business of operating a telephone plant, being a common carrier of news and intelligence, is charged with the public duty to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under similar conditions. Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

ience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."⁶²

"It no longer is open to dispute that, under the Constitution, what the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public."⁶³

"The right of judicial interference exists only when the schedule of rates established will fail to secure to the owner of the property some compensation or income from his investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge. The question is then one alone of policy. Whether, by reducing the compensation to a minimum, railroad enterprises shall be discouraged, or, by enlarging, encouraged, is a matter for legislative, and not judicial, determination."⁶⁴

"The theory, apparently, upon which this suit is brought, is that the parties have an appeal from the legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not the case. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and

⁶² Harlan, J., in *SMYTH v. AMES*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

⁶³ Holmes, J., in *SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

⁶⁴ Brewer, J., in *Chicago & N. W. R. Co. v. Dey (C. C.)* 35 Fed. 878, 879, 1 L. R. A. 744.

extreme function of the courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals." **

** Brewer, J., in *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176.

CHAPTER XXI.**RAILROADS.**

- 190. Public Qualities.
- 191. Common Carrier.
- 192. Eminent Domain.
- 193. Delegated Power.
- 194. Abuse of Power.
- 195. Public Control.
- 196. Municipal Regulation.
- 197. Street Railways.
- 198. Judicial Power.

PUBLIC QUALITIES.

- 190. A railroad company is a quasi public corporation, in that**
- (a) The railroad is a public highway;**
 - (b) The company performs the functions and owes to the public the duties of a common carrier;**
 - (c) It exercises the sovereign power of eminent domain.**

There are in the United States many short lines of railroad constructed and operated solely for the convenience and benefit of the owner or lessees. Such railroads, like other private roads, have no public relations, duties, or powers, but are under the exclusive control and regulation of their owners and managers, and are not considered in this book. They are as unlike the ordinary railroad as a purely private road is unlike the public highway. The word "railroad" herein, unless qualified, is intended to embrace all public railroads, whether commercial, interurban, elevated, or street railways.

Public Highway.

The American notion that railroads are private institutions, and no more subject to public regulation and control than other private corporations, is of recent birth and growth. At their

origin railroads were regarded only as public highways.¹ They were intended to be used like turnpikes by any one who could provide himself with the requisite vehicle and motive power, and would pay the lawful toll, and were so used in England for many years.² The original charters of incorporation were formulated with reference to this purpose and mode of operation, and often contained provisions that other companies or persons should have the right to connect with the railroad provided for in the charter, and to enter upon it with necessary cars.³ The company owned and controlled the right of way and railroad only, while each person using it furnished his own rolling stock; and the same general practice and mode of operation prevailed as on canals.⁴ These early forms of charter were naturally followed in the later charters, and under familiar rules of law the construction which had been given to particular words and phrases under the old charters, being applied to the later ones, caused no little surprise to those cherishing the modern idea of private ownership and control.⁵

Not Necessarily a Transportation Company.

An act of Congress granting lands to aid in the construction of a railroad provided that "said railroad shall be and remain a public highway for the use of the government of the United States free from all tolls or other charge for the transportation of any property or troops of the United States." The War and Treasury Departments, under this provision, naturally claimed free transportation, and resisted a claim of the rail-

¹ *OLCOTT v. SUPERVISORS*, 16 Wall. (U. S.) 678, 21 L. Ed. 382; *Commonwealth v. Railroad Co.*, 12 Gray (Mass.) 180.

² *King v. Railway Co.*, 2 Barn. & Ald. 648; *Pierce, R. R.* p. 2; *Miller, J.*, in *Lake Shore & M. R. Co. v. United States*, 93 U. S. 458, 23 L. Ed. 965.

³ *Atchison, T. & S. F. R. Co. v. Railroad Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291.

⁴ *Union Trust Co. v. Railroad Co.*, 117 U. S. 455, 6 Sup. Ct. 809, 29 L. Ed. 963; *Trunick v. Smith*, 63 Pa. 18.

⁵ *Pelk v. Railroad Co.*, 94 U. S. 164, 24 L. Ed. 97; 1 Wood, R. R. p. 3.

road company for transporting troops and property of the United States over the railroad. The United States Supreme Court decided that, while this clause gave to the United States the free use of the railroad—i. e. the roadbed and rails—it did not entitle the government to the free use of the rolling stock and other property of the railroad company, and the free services of its employes, and therefore sustained the claim of the railroad company against the United States for compensation for carrying its troops and property.⁶ The court in this case declares *arguendo* that a railroad company is not necessarily a transportation company, and only possesses power to act as such when it is granted in the charter “expressly or by clear implication.”⁷ Lacking this power, however, a railroad company would be equally a quasi public corporation by reason of the railroad being a public highway, or of its having the power of eminent domain; either of which is sufficient to give it this character and subject it to public regulation. If, therefore, a railroad company possesses any of these faculties, viz., the power of eminent domain, functions of a common carrier, or the ownership or management of a public highway, it is a quasi public corporation.⁸

Lesser Railroads.

The rules and considerations which make a commercial or through railroad a public highway are obviously more potent and applicable on other kinds of railroads. A street railway is physically as well as logically a part of the highway. “Interurban” describes that class of railroads used to connect neighboring cities and towns, which, though not necessarily, yet commonly, use the streets and highways for their roadbed. Elevated railroads, being those not laid upon the earth’s surface, but built upon viaducts, enabling them to run at some

⁶ *Lake Shore & M. R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965.

⁷ 93 U. S. 451, 23 L. Ed. 965.

⁸ *Baldw. Am. R. R. Law*, 90; 1 *Beach, Pub. Corp.* § 2; *Maginnis v. Ice Co.*, 112 Wis. 385, 88 N. W. 300.

distance above the ordinary grade of travel, likewise generally, if not exclusively, occupy the streets and highways. All these railroads being impediments and obstructions to the common use of the highway by private persons, and increasing the ordinary dangers of travel, are peculiarly public highways under quasi public corporations,⁹ and necessarily subject to public regulation and control for the protection of persons traveling and property transported along the same highway.¹⁰

COMMON CARRIER.

191. A railroad company, being chartered for the purpose of performing the functions of a common carrier, thereby undertakes to discharge the duties of a common carrier for the public, and thus also becomes a quasi public corporation, and subject to regulation as such.

Corporations, whether public or private, may only perform lawful acts within the scope of their charter. A cessation of user of the corporate powers renders the corporation liable to dissolution.¹¹ But the quasi public corporation is liable not only to dissolution, but also to regulation while in being, so as to insure a performance of its duties to the public.¹² Being a private corporation, its charter is a contract with the state, and must be so respected by the powers of the state;¹³ but there is also a reciprocal obligation on the part of

⁹ *General Electric Ry. Co. v. Railroad Co.*, 184 Ill. 588, 56 N. E. 963; *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859.

¹⁰ *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *Cleveland, C., C. & St. L. R. Co. v. Hamilton*, 200 Ill. 633, 66 N. E. 389.

¹¹ *Clark, Corp.* p. 237.

¹² *Missouri Pac. R. Co. v. Humes*, 115 U. S. 522, 6 Sup. Ct. 110, 29 L. Ed. 463; *State of California v. Railroad Co.*, 127 U. S. 40, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 296, 297, 19 Sup. Ct. 465, 43 L. Ed. 702.

¹³ *Hamilton v. Keith*, 5 Bush (Ky.) 458; *DARTMOUTH COLLEGE v. WOODWARD*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; *Dela-*

the company to perform its functions and discharge its duties to the public which it promises to serve; and this contract the state may enforce against the corporation for the public benefit.¹⁴

Public Duties.

As a common carrier of goods and passengers the railway company is bound to receive and transport goods and persons indifferently for all who make lawful application for such carriage.¹⁵ As the common carrier of goods a railroad company is an insurer, and is bound to deliver them at the point of destination, unless prevented by the act of God, the public enemy, or of the owner himself, or by reason of the intrinsic character of the goods themselves.¹⁶ The failure for any other cause to

ware *Railroad Tax Case*, 18 Wall. (U. S.) 206, 21 L. Ed. 888; *THORPE v. RAILROAD CO.*, 27 Vt. 141, 62 Am. Dec. 625.

¹⁴ *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *State v. Railway Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Inhabitants of Worcester v. Railroad Corp.*, 4 Metc. (Mass.) 564; *Newburyport Turnpike Corp. v. Railroad Co.*, 23 Pick. (Mass.) 326; *OLCOTT v. SUPERVISORS*, 16 Wall. (U. S.) 678, 21 L. Ed. 382; *State v. Railroad Co.*, 29 Conn. 538; *People v. Railroad Co.*, 24 N. Y. 261, 82 Am. Dec. 295.

¹⁵ *Verner v. Sweitzer*, 32 Pa. 208; *Samms v. Stewart*, 20 Ohio, 69, 55 Am. Dec. 445; *Nashville & C. R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; *Houston & T. C. Ry. Co. v. Harn*, 44 Tex. 628; *East Omaha St. R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491; *Inman v. Railroad Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37; *Mobile & G. R. Co. v. Williams*, 54 Ala. 168; *Ohio & M. Ry. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727; *Finn v. Railroad Corp.*, 112 Mass. 524, 17 Am. Rep. 128.

But an exception is made in case of drunken people. *Freedon v. Railroad Co.*, 24 App. Div. 306, 48 N. Y. Supp. 584.

¹⁶ *Reed v. Steamboat Co.*, 1 Marv. (Del.) 193, 40 Atl. 955; *Boehl v. Railway Co.*, 44 Minn. 192, 46 N. W. 333; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Michaels v. Railroad Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Van Winkle v. Railroad Co.*, 38 Ga. 32; *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489.

make such delivery renders the carrier absolutely liable.¹⁷ As the carrier of passengers the corporation, though not an insurer, is held to the highest degree of diligence and care.¹⁸ The carriage of live stock by a railway company was not a public duty at common law, but the subject of private contract.¹⁹ Hundreds of thousands of persons and millions of dollars worth of property are carried daily by the railroads of the United States; and their protection is one of the chief objects of solicitude by both the state and federal governments. The manifestation of this is seen in the interstate commerce act,²⁰ and the so-called Sherman Act ²¹ of the federal Congress, and in the numerous statutes enacted by the several states, requiring alarm signals, air brakes, stopping at railroad crossings and drawbridges, abolishing of grade crossings at highways, the building of cattle guards, fences, and other provisions too

¹⁷ *Little Rock, M. R. & T. Ry. Co. v. Talbot*, 47 Ark. 97, 14 S. W. 471; *Lewis v. Smith*, 107 Mass. 334; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695.

¹⁸ *Washington & G. R. Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233; *Chicago & A. R. Co. v. Murphy*, 198 Ill. 462, 64 N. E. 1011; *Stoddard v. Railroad Co.*, 181 Mass. 422, 63 N. E. 927; *Stierle v. Railway Co.*, 156 N. Y. 684, 50 N. E. 834.

¹⁹ *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239; *Hinkle v. Railway Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289; *Clarke v. Railroad Co.*, 14 N. Y. 570, 67 Am. Dec. 205.

But see contra, 3 Woods, R. R. § 452b, note 1. This apparent conflict may be reconciled by noting that (a) a common carrier at common law is not bound to receive and carry all kinds of chattels, but goods only (3 Woods, R. R. § 424); and (b) at common law only the "act of God and the king's enemies" excused failure to deliver. American statutes and decisions have somewhat modified both these rules. Note 16, *supra*, and *infra*, 104.

²⁰ Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154].

²¹ Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

numerous to mention. Suffice it here to say that they are all legislative instances of the exercise of the sovereign power of the state to protect the public against extortion and prevent injury to and destruction of life and property.²²

EMINENT DOMAIN.

192. Railroad companies are permitted to exercise the sovereign power of eminent domain solely upon the ground that they perform public functions for the public welfare.

Eminent domain is defined to be "the right which the people or government retain over the estates of individuals to resume the same for public use."²³ Most, if not all, of the state constitutions expressly forbid the exercise of this power for any other than the public use, and then only upon just compensation being made. This power has always been exercised by the people or sovereign for public highways, which are absolutely necessary for freedom and facility of locomotion and transportation.²⁴ Railroads being from the first regarded as public highways, the various states have from the inception of railway construction conferred upon railroad corporations the right to come into the courts, and have condemned for their use so much of the private estates of citizens as was requisite to enable them to construct their roads and appurtenances necessary to the efficient performance of their functions as public servants, upon paying to the owner a just compensation there-

²² 3 Woods, R. R. pp. 2061, 2072-2080; Evans v. Railway Co., 133 Ala. 482, 32 South. 138; Herrell v. Railroad Co., 114 Wis. 605, 90 N. W. 1071.

²³ 1 Bouv. Law Dict. in verb; Lewis, Em. Dom. c. 1.

²⁴ Elliott, Roads & St. § 146; Redf. Rys. § 63; Bankhead v. Brown, 25 Iowa, 540; Wild v. Delg, 43 Ind. 455, 13 Am. Rep. 399; State ex rel. Cape Girardeau v. Engelmann, 106 Mo. 628, 17 S. W. 759; WEST RIVER BRIDGE CO. v. DIX, 6 How. (U. S.) 507, 12 L. Ed. 535; Arnold v. Bridge Co., 1 Duv. (Ky.) 372.

for.²⁵ Legislatures have occasionally passed acts conferring this right upon private corporations or individuals, as for the erection of mills and factories, or the opening of private ways; but upon challenge the courts have uniformly declared such acts to be void, because the property thus authorized to be taken was to be applied not to public, but to private, use.²⁶ With equal uniformity, also, have the courts decided, whenever the right of railroad companies to exercise this power has been called in question, that acts clothing railroad corporations with this power were valid, because railroads are a public necessity in modern civilization, being improved forms of public highways.²⁷ All railroad companies are therefore quasi public cor-

²⁵ *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 108, 23 L. Ed. 67; *Southern Pac. R. Co. v. Wilson*, 49 Cal. 396; *Oregonian R. Co. v. Hill*, 9 Or. 377; *NEW YORK & H. R. CO. v. KIP*, 46 N. Y. 546, 7 Am. Rep. 385; *Freedle v. Railroad Co.*, 49 N. C. 89; *Hamilton v. Railroad Co.*, 1 Md. Ch. 107; *In re Mt. Washington Road Co.*, 35 N. H. 134; *EAST TENNESSEE & V. R. CO. v. LOVE*, 3 Head (Tenn.) 63.

²⁶ 2 Kent, Comm. (5th Ed.) 340, note c; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Scudder v. Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Beekman v. Railroad Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Turner v. Althaus*, 6 Neb. 54; *Bradley v. Railroad Co.*, 21 Conn. 294; *Mills, Em. Dom.* § 23; *Maginnis v. Ice Co.*, 112 Wis. 385, 88 N. W. 300; *Garbutt Lumber Co. v. Railway Co.*, 111 Ga. 714, 36 S. E. 942; *IN RE NIAGARA FALLS & W. RY. CO.*, 108 N. Y. 375, 15 N. E. 429; *Pittsburg, W. & K. R. Co. v. Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680; *In re Rhode Island Suburban Ry. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879.

²⁷ *People v. Railroad Co.*, 58 N. Y. 152; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *Lehmicke v. Railroad Co.*, 19 Minn. 464 (Gil. 406); *Toledo & W. Ry. Co. v. Daniels*, 16 Ohio St. 390; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. 103; *Charleston & S. R. Co. v. Blake*, 12 Rich. Law (S. C.) 634; *Nichols v. Railroad Co.*, 43 Me. 356. "A railroad is a public highway established primarily for the convenience of the people, and to subserve public ends, and is subject to governmental control and regulation. For these reasons a corporation owning it may, under legislative sanction, take private property for a right of way upon making just compensation to the owner." *Cherokee*

porations, and hold the property so taken by eminent domain, together with the property obtained by purchase or grant, for the public use. This doctrine covers all the property of the railway company necessary for the performance of its public functions.²⁸

DELEGATED POWER.

193. Railroad companies exercise this power of eminent domain only as special agents of the state for the particular purpose for which they are chartered, to the extent authorized, and in the mode directed or permitted by their principal.

The state alone possesses the power of eminent domain as an inherent right. Corporations may use it only as a delegated power.²⁹ In its exercise they act as the special agents of the state, and must therefore always be able to show their appointment and authority.³⁰ Such a tremendous power can only be exercised under legal limitation and in accordance with fixed rules; and the doctrine of the courts with regard to this power has avowedly been that of strict construction.³¹ Railroad com-

Nation v. Railway Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295.

²⁸ *East Alabama Ry. Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. 290; *State v. Railroad Co.*, 29 Conn. 538; *People v. Railroad Co.*, 24 N. Y. 261, 82 Am. Dec. 295.

²⁹ *Florida Cent. & P. R. Co. v. Bell*, 43 Fla. 359, 31 South. 259; *Ash v. Cummings*, 50 N. H. 501; *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140; *Buffalo & N. Y. C. R. Co. v. Brainerd*, 9 N. Y. 100; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Alexandria & F. Ry. Co. v. Railroad Co.*, 75 Va. 780, 40 Am. Rep. 743; *North Missouri R. Co. v. Gott*, 25 Mo. 540.

³⁰ *Atlantic & O. R. Co. v. Sullivant*, 5 Ohio St. 276; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

³¹ *Alexandria & F. Ry. Co. v. Railroad Co.*, 75 Va. 780, 40 Am. Rep. 743; *Mayor, etc., of City of Atlanta v. Railroad Co.*, 53 Ga. 120;

panies, therefore, possess no inherent power of eminent domain, but only such as is conferred expressly or by necessary implication.

What Companies May Exercise This Power.

The state may confer this power not only upon domestic, but also upon foreign, railroad corporations;³² but no presumption will be indulged in favor of the foreign corporation. It must show its authority beyond reasonable doubt.³³ A de facto railroad corporation may also exercise this power,³⁴ but not a company existing without legal authority.³⁵ Nor does a railroad receiver have this power, unless specially authorized thereunto by special order of court; and, even then, he may not proceed in his own name, but must use the name of the company in obtaining condemnation.³⁶ A lessee may not ordinarily exercise this power; but if it be acting under an authorized lease of the franchise of a company whose railroad is only

Mississippi River Bridge Co. v. Ring, 58 Mo. 491; *Tracy v. Railroad Co.*, 80 Ky. 259; *Durant v. Jersey City*, 25 N. J. Law, 309; *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 26 Tex. 588.

A railroad company can take land for railroad purposes only where a necessity exists which is recognized by statute, and provided for therein; and, when a railroad company claims such right, it must make out a case within the statute. *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118.

³² *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. Ed. 354; *Abbott v. Railroad Co.*, 145 Mass. 450, 15 N. E. 91. See, also, *Columbus Waterworks Co. v. Long*, 121 Ala. 245, 25 South. 702.

³³ *Holbert v. Railroad Co.*, 45 Iowa, 23.

³⁴ *Nichols v. Railway Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *McAuley v. Railway Co.*, 83 Ill. 348; *Brown v. Railway Co.*, 68 Ark. 134, 56 S. W. 862; *Oregon Cascade R. Co. v. Baily*, 3 Or. 164.

³⁵ *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *American Loan & Trust Co. v. Railroad Co.*, 157 Ill. 641, 42 N. E. 153; *New York Cable Co. v. New York*, 104 N. Y. 1, 10 N. E. 332; *Powers v. Railway Co.*, 33 Ohio St. 429.

³⁶ *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

partially constructed it succeeds thereunder to the authority of the lessor necessary to the completion of the road. But here, too, the proceedings should be brought in the name of the lessor.³⁷

How Power is Exercised.

The power of eminent domain cannot be summarily exercised.³⁸ The statute which grants it to railroad corporations usually provides the mode of its exercise, and confers the jurisdiction therefor upon the courts of the state, or some special tribunal thereunto appointed, which hears and decides upon the application for condemnation of property for railroad use by due process of law.³⁹ This requires notice to the owner.⁴⁰ If the charter does not specially describe the land to be taken, then the board of directors, as the general managers of the corporation, must decide upon the location of the road and the lands to be condemned for the use of the company;⁴¹ and this choice will not be interfered with by the courts except in case of manifest abuse of the discretionary power existing in the directors.⁴² Condemnation proceedings may be defeated

³⁷ *Mayor, etc., of Worcester v. Railroad Co.*, 109 Mass. 103; *Hunting v. Railway Co.*, 73 Conn. 179, 46 Atl. 824.

³⁸ *State v. Morse*, 50 N. H. 9; *Nichols v. Railroad Co.*, 43 Me. 356; *Currier v. Railroad Co.*, 11 Ohio St. 228.

³⁹ *In re Clifford*, 59 Me. 262; *Ames v. Railroad Co.*, 21 Minn. 241; *Shue v. Commissioner*, 41 Mich. 638, 2 N. W. 808; *Colville v. Judy*, 73 Mo. 651; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463.

⁴⁰ *Huling v. Improvement Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045; *New York, N. H. & H. R. Co. v. Long*, 69 Conn. 424, 37 Atl. 1070; *Missouri River, Ft. S. & G. R. Co. v. Owen*, 8 Kan. 409.

⁴¹ *Williamsport & N. B. R. Co. v. Railroad Co.*, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; *Stringham v. Railroad Co.*, 33 Wis. 471; *Weidenfeld v. Railroad Co.* (C. C.) 48 Fed. 615.

⁴² *NEW YORK & H. R. CO. v. KIP*, 46 N. Y. 546, 7 Am. Rep. 385; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358; *Cotton v. Boom Co.*, 22 Minn. 372; *New York & E. R. Co. v. Young*, 33 Pa. 175.

by the owner of the land by showing that the land is not to be taken for public use.⁴⁵

How Much Land, and for What Special Uses.

Obviously, the company must have the right to take sufficient land to make its roadbed and lay its tracks and side tracks.⁴⁶ The width allowed to be taken is usually limited by the statute; but the corporation need not take nor pay for the entire width, nor, indeed, a uniform width, for right of way.⁴⁸ Cuts and fills, especially when deep or high, require much more width than a surface road; and the company, in order to protect itself against future claims for damages caused by the natural caving in or running down of embankments, or for any other proper railroad use may take land in reasonable anticipation of future wants.⁴⁹ Land may also be taken for spur tracks to adjacent mills or factories;⁴⁷ but it has been held that a spur track a half mile in length is not appurtenant to the railroad, and land cannot be condemned therefor.⁴⁸ Condemnation may be made also for the land necessary for stations, depots, section houses, water tanks, roundhouses, car yards and barns and repair shops—all being necessary for the beneficial enjoyment of the franchise and the efficient operation of the

⁴⁵ *Chicago, R. I. & P. R. Co. v. Lake*, 71 Ill. 333; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; *People v. Railroad Co.*, 53 Cal. 694; *Appeal of Edgewood R. Co.*, 79 Pa. 257.

⁴⁶ *Williams v. Railroad Co.*, 13 Conn. 110.

⁴⁷ *Jones v. Railroad Co.*, 144 Pa. 629, 23 Atl. 251; *Id.*, 169 Pa. 333, 32 Atl. 535, 47 Am. St. Rep. 916.

⁴⁸ *Lodge v. Railroad Co.*, 8 Phila. (Pa.) 345; *Nading v. Railroad Co.* (Tex. Civ. App. 1901) 62 S. W. 97; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *Plymouth R. Co. v. Colwell*, 39 Pa. 337, 80 Am. Dec. 526.

⁴⁷ *Appeal of New York, N. H. & H. R. Co.*, 75 Conn. 264, 53 Atl. 314; *Toledo, S. & M. R. Co. v. Railroad Co.*, 72 Mich. 206, 40 N. W. 436.

⁴⁸ *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Smithko v. Railway Co.*, 5 Pa. Dist. R. 543; *Hannibal & St. J. R. Co. v. Totman*, 149 Mo. 657, 51 S. W. 412.

road;⁴⁹ but it has been held that land may not be condemned for a car factory.⁵⁰ Authority may be given to take the fee of the land; but a perpetual easement is sufficient for railroad purposes, and usually this is what is granted to the corporation.⁵¹ Each state, however, makes its own regulations in all matters of condemnation, and its statutes must be consulted for the rules applicable therein.

Lands Already Devoted to a Public Use.

A railroad company may also exercise eminent domain over lands already appropriated to some public use, whether by dedication or condemnation, whenever it is necessary for the efficient exercise of its corporate franchise.⁵² This power, however, must be plainly shown in order to sustain condemnation of such lands in whole or in part, or of franchises already therein existing.⁵³ Proceedings have been sustained for con-

⁴⁹ Nashville & C. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; New York Cent. & H. R. R. Co. v. Gaslight Co., 63 N. Y. 326; In re New York Cent. & H. R. R. Co., 77 N. Y. 248; Giesy v. Railroad Co., 4 Ohio St. 308; Chicago, R. I. & P. R. Co. v. People, 4 Ill. App. 468; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165.

Railway stations may be erected on public property. Capdevielle v. Railroad Co., 110 La. 904, 34 South. 868.

⁵⁰ Eldridge v. Smith, 34 Vt. 484; NEW YORK & H. R. CO. v. KIP, 46 N. Y. 546, 7 Am. Rep. 385.

⁵¹ Lewis, Em. Dom. § 278.

⁵² Butte, A. & P. Ry. Co. v. Railway Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; Rutland Canadian R. Co. v. Railway Co., 72 Vt. 128, 47 Atl. 399; Cumberland Telephone & Telegraph Co. v. Railroad Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544; Inhabitants of Greenwich Tp. v. Railroad Co., 24 N. J. Eq. 217; Little Miami & C. & X. R. Co. v. Dayton, 23 Ohio St. 510; Youghiogheny Bridge Co. v. Railroad Co., 201 Pa. 457, 51 Atl. 115.

A railroad company may cross a right of way condemned by another company. Minneapolis & St. L. R. Co. v. Railroad Co., 116 Iowa, 681, 88 N. W. 1082.

⁵³ Inhabitants of Springfield v. Railroad Co., 4 Cush. (Mass.) 63; In re Boston & A. R. Co., 53 N. Y. 574; New York, H. & N. R. Co. v. Railroad Co., 36 Conn. 196; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

demnation to railroad use of portion of a public park;⁵⁴ a highway;⁵⁵ lands already taken by another railway company;⁵⁶ and a trackage right over the roadbed and rails of another company, but express grant is required for this.⁵⁷ In virtue of this general doctrine, companies authorized to construct a railroad from one fixed point to another have the implied right of crossing highways and railroads along its right of way between these points;⁵⁸ but the state may forbid grade crossings,⁵⁹ in which case the company constructing the new road may and must make necessary alterations in the existing highway or railroad to enable it to effect its crossing by bridge or tunnel.⁶⁰

⁵⁴ *Colby v. Toledo*, 22 Ohio Cir. Ct. R. 732, 12 O. C. D. 347; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *People v. Kerr*, 27 N. Y. 188.

But general authority to construct a railroad does not authorize a location through a public park. In re *New York & B. B. Ry. Co.*, 20 Hun (N. Y.) 201; In re *Boston & A. R. Co.*, 53 N. Y. 574.

⁵⁵ *Inhabitants of Greenwich Tp. v. Railroad Co.*, 24 N. J. Eq. 217; *Boston Water Power Co. v. Railroad Corp.*, 23 Pick. (Mass.) 360.

⁵⁶ *Seattle & M. R. Co. v. Railroad Co.*, 29 Wash. 491, 69 Pac. 1107; *East St. Louis Connecting Ry. Co. v. Railway Co.*, 108 Ill. 265; *North Carolina & R. & D. R. Co. v. Railway Co.*, 83 N. C. 489.

⁵⁷ *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *National Ry. Co. v. Railroad Co.*, 36 N. J. Law, 181.

⁵⁸ *National Ry. Co. v. Railroad Co.*, 36 N. J. Law, 181; *City of Clinton v. Railroad Co.*, 24 Iowa, 455; *Inhabitants of Springfield v. Railroad Co.*, 4 Cush. (Mass.) 63.

⁵⁹ *NEW YORK & N. E. R. CO. v. BRISTOL*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269.

⁶⁰ *Muhiker v. Railroad Co.*, 173 N. Y. 549, 66 N. E. 558; *Newton v. Railroad Co.*, 72 Conn. 420, 44 Atl. 813; *NEW YORK & N. E. R. CO. v. BRISTOL*, *supra*. Change to grade crossing may be required. *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87.

ABUSE OF POWER.

194. The delegation of the power of eminent domain is upon the implied condition that it shall be exercised in good faith, and that the fruits obtained therefrom shall be applied solely to the public use specified in the charter.

The exercise of this power in bad faith may be resisted not only in condemnation proceedings,⁶¹ but by injunction after condemnation has been effected, and even after the land appropriated has been taken and used by the company.⁶² Where the fee has been obtained by proceedings in good faith, the company may sell the land or a portion thereof to another railroad company, so as to continue its advantageous use;⁶³ but the company has no power of alteration or perversion of the use.⁶⁴ It may take all timber and gravel and earth needed for the railroad which is found upon the right of way,⁶⁵ but cannot sell or dispose of the same to others.⁶⁶ It may do only that which is necessary for the improvement of the highway and

⁶¹ *South Carolina R. Co. v. Blake*, 9 Rich. Law (S. C.) 228; *Hentz v. Railroad Co.*, 13 Barb. (N. Y.) 646; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *New Central Coal Co. v. Iron Co.*, 37 Md. 537.

The necessity of using the particular property sought is a prerequisite to the exercise of the power of eminent domain over it by a corporation having that power. *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 852, 54 C. C. A. 186.

⁶² *Swinney v. Railroad Co.*, 59 Ind. 205; *Board of Sup'rs of Culpeper County v. Gorrell*, 20 Grat. (Va.) 484; *Hill v. Western Vermont R. Co.*, 32 Vt. 68. But see *Union Pac. R. Co. v. Cable Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

⁶³ *Crolley v. Railway Co.*, 30 Minn. 541, 16 N. W. 422; *Eastern R. Co. v. Railroad*, 111 Mass. 125, 15 Am. Rep. 13.

⁶⁴ *Proprietors of Locks & Canals on Merrimack River v. Railroad Co.*, 104 Mass. 1, 6 Am. Rep. 181.

⁶⁵ *Chapin v. Railroad*, 39 N. H. 564, 75 Am. Dec. 237.

⁶⁶ *Aldrich v. Drury*, 8 R. I. 554, 5 Am. Rep. 624.

the efficient operation of the road.⁶⁷ For this purpose it has been held that it may dig wells, straighten water courses, and stop flowing of springs;⁶⁸ also that it may permit the erection of any building upon the right of way which will promote the interests of the company, or facilitate the operation of the road, such as elevators, factories, and the like.⁶⁹ But it cannot authorize by lease or otherwise the construction thereon of any buildings, nor any other use thereof by private persons for purely private benefit.⁷⁰

Compensation.

The rules determining the measure of damages in the several states are not exactly uniform; but in general it will be found that the just compensation guaranteed by the Constitution requires cash payment for the land actually taken at full market value.⁷¹ Incidental damages to land not actually taken are also allowed;⁷² but against this the company may usually set

⁶⁷ *Miller v. Railway Co.*, 125 Mich. 171, 84 N. W. 49, 51 L. R. A. 955, 84 Am. St. Rep. 569; *Memphis, P. P. & B. R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946.

⁶⁸ *Hougan v. Railway Co.*, 35 Iowa, 558, 14 Am. Rep. 502; *Baltimore & P. R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310.

⁶⁹ *Grand Trunk R. Co. of Canada v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Gurney v. Elevator Co.*, 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.

⁷⁰ *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; *Proprietors of Locks & Canals on Merrimack River v. Railroad Co.*, 104 Mass. 1, 6 Am. Rep. 181.

⁷¹ 2 *Lewis, Em. Dom.* §§ 460, 478; *Southern Kansas Ry. Co. v. Oklahoma City*, 12 Okl. 82, 69 Pac. 1050; *Foote v. Railway Co.*, 21 Ohio Cir. Ct. R. 319, 11 O. C. D. 685.

⁷² *Drury v. Railroad Co.*, 127 Mass. 571; *Aldrich v. Railroad Co.*, 21 N. H. 359, 53 Am. Dec. 212; *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366.

But mere disturbance of an "aesthetic sensibility," impairing the enjoyment of abutting owners, was held not to impair any legal right. *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323.

See, also, *Richmond P. & C. R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Illinois Cent. R. Co. v. Turner*, 194 Ill. 575, 62 N. E.

off incidental benefits.⁷³ The value is assessed not upon the basis of the owner's use or any particular use; but any use to which the property is adapted may be taken into consideration in ascertaining the value.⁷⁴ Market value, when not controlling, is recognized as an important element in the assessment of damages;⁷⁵ but if there be no market for that particular land at the time and place taken, the jury or appraisers are to estimate the value of the land taken in the shape taken, assuming that the company wishes to buy and the owner to sell the land.⁷⁶ When land already appropriated to public use is condemned, the general rule is that no compensation is required therefor, the doctrine being that it is merely a substitution or addition of a new form or instance of public use to an old

798; *Mosler v. Navigation Co.*, 39 Or. 256, 64 Pac. 453, 87 Am. St. Rep. 652.

Contra, *Frost v. Railroad Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68. As to what are incidental damages, see *Aldrich v. Metropolitan West Side El. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237.

⁷³ *Abney v. Railroad Co.*, 105 La. 446, 29 South. 890; *St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company*, 160 Mo. 396, 61 S. W. 300; *WOODFOLK v. RAILROAD CO.*, 2 Swan (Tenn.) 422; *Meacham v. Railroad Co.*, 4 Cush. (Mass.) 291; 2 Lewis, Em. Dom. §§ 468, 470.

In condemning land for a railroad, the jury may consider benefits to the land not taken, though such benefits also accrued to other land in the vicinity. *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 59 L. R. A. 581, 92 Am. St. Rep. 188.

⁷⁴ *Cochran v. Railroad Co.*, 94 Mo. App. 469, 68 S. W. 367; *Sullivan v. Same*, 29 Tex. Civ. App. 429, 68 S. W. 745; *In re Daly*, 72 App. Div. 394, 76 N. Y. Supp. 28; *In re New York W. & R. R.*, 21 Hun (N. Y.) 250. See, also, *ALLOWAY v. NASHVILLE*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; *MISSISSIPPI & RUM RIVER BOOM CO. v. PATTERSON*, 98 U. S. 403, 25 L. Ed. 206.

⁷⁵ *Illinois Cent. R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798; *Lough v. Railroad Co.*, 116 Iowa, 31, 89 N. W. 77; *Troy & B. R. Co. v. Lee*, 13 Barb. (N. Y.) 169; *Sheldon v. Railway Co.*, 29 Minn. 318, 13 N. W. 134; *Friday v. Railroad Co.*, 204 Pa. 405, 54 Atl. 339; *Russell v. Railroad Co.*, 71 Ark. 451, 75 S. W. 725.

⁷⁶ *WOODFOLK v. RAILROAD CO.*, 2 Swan (Tenn.) 422.

one.⁷⁷ Thus, to one having the right of public access to a water front no compensation was allowed for his deprivation thereof by the erection of a railway along the water front.⁷⁸ But where the present holder under eminent domain has made expenditures thereon, and is exercising the franchise thereunder, as in case of condemnation of a trackage right of an existing railroad, compensation therefor by the new company must be made to the old.⁷⁹ The appropriation of a public highway to the use of a street railway imposes no additional servitude on abutting owners, even though they hold legal title to the middle of the street; nor are they entitled to any compensation therefor.⁸⁰ But it is otherwise when a commercial or elevated railroad is built along the highway.⁸¹

⁷⁷ *Northern R. Co. v. Earhardt*, 167 Mo. 612, 67 S. W. 229; *Phillips v. Cable Co.*, 131 N. C. 225, 42 S. E. 587, reversing 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *Baltimore & H. Turnpike Co. v. Railroad Co.*, 35 Md. 224, 6 Am. Rep. 397; *Metropolitan R. Co. v. Railway Co.*, 118 Mass. 290; *Barre R. Co. v. Railroad Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785; *Cumberland Telephone & Telegraph Co. v. Railroad Co. (C. O.)* 42 Fed. 273, 12 L. R. A. 544; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23.

⁷⁸ *Frost v. Railroad Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68. But see *Rumsey v. Railroad Co.*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600.

⁷⁹ *Metropolitan R. Co. v. Railroad Co.*, 12 Allen (Mass.) 262; *Enfield Toll Bridge Co. v. Railroad Co.*, 17 Conn. 40, 42 Am. Dec. 716.

⁸⁰ *Street Ry. Co. v. Doyle*, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933; *Hobart v. Railroad Co.*, 27 Wis. 194, 9 Am. Rep. 461; *Eichels v. Railway Co.*, 78 Ind. 761, 41 Am. Rep. 561.

Operation of a street railroad is an appropriate public use of a street, and imposes no additional burden. *Appeal of Milbridge &*

⁸¹ *Rische v. Transportation Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324; *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Schaaf v. Railway Co.*, 66 Ohio St. 215, 64 N. E. 145; *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *Imlay v. Railroad Co.*, 26 Conn. 249, 68 Am. Dec. 392.

PUBLIC CONTROL.

195. The scope and measure of the exercise by the state of the power of railroad regulation is to be found in the necessity to protect the public against

(1) The physical dangers incident to the operation of the railroad;

C. Electric R. Co., 96 Me. 110, 51 Atl. 818. See, also, Birmingham Traction Co. v. Electric Co., 119 Ala. 137, 24 South. 502, 48 L. R. A. 233; Baker v. Railway Co., 130 Ala. 474, 30 South. 464; Canastota Knife Co. v. Tramway Co., 69 Conn. 146, 36 Atl. 1107; Philadelphia, W. & B. R. Co. v. Railroad Co. (Del. Ch.) 38 Atl. 1067; State v. Railroad Co., 29 Fla. 590, 10 South. 590; Ashland & C. St. R. Co. v. Faulkner, 106 Ky. 332, 21 Ky. Law Rep. 154, 45 S. W. 235, 51 S. W. 806, 43 L. R. A. 554; Snyder v. Railway Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Chicago Office Bldg. v. Railway Co., 87 Ill. App. 594; Southern Ry. Co. v. Power Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; Decker v. Railway Co., 133 Ind. 493, 33 N. E. 349; Ehret v. Railroad Co., 61 N. J. Eq. 171, 47 Atl. 562; Sells v. Railway Co., 28 Wkly. Law Bul. (Ohio) 172; Poole v. Railway Co., 88 Md. 533, 41 Atl. 1069; Elfelt v. Railway Co., 53 Minn. 68, 55 N. W. 116; Placke v. Railway Co., 140 Mo. 634, 41 S. W. 915; Dean v. Railway Co., 93 Mich. 330, 53 N. W. 396; Akron, B. & C. R. Co. v. Keck, 23 Ohio Cir. Ct. R. 57; Patterson v. Pittson, 8 Kulp (Pa.) 530; Linden Land Co. v. Light Co., 107 Wis. 493, 83 N. W. 851; Collins v. Traction Co., 5 Pa. Dist. R. 18; Reid v. Railroad Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708.

But see Nichols v. Railway Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Jaynes v. Railway Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Zehren v. Light Co., 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844; Rische v. Transportation Co., 27 Tex. Civ. App. 33, 66 S. W. 324; Hellman v. Railway Co., 145 Pa. 23, 23 Atl. 389.

Street railways, operated either by horse or electric power, legally authorized and located in a public highway, are not a new and additional servitude, entitling the owner of abutting land to additional compensation for the mere use of the highway or the destruction of trees standing thereon, made necessary for the proper location thereof, if he is not deprived of ingress and egress from his premises. Akron, B. & C. R. Co. v. Keck, 23 Ohio Cir. Ct. R. 57.

- (2) **The discomforts and inconveniences to the traveling public and shippers;**
- (3) **The oppressions and exactions suffered from an abuse of the immense powers conferred upon them by law.**

The dangers incident to the tremendous force necessary to the operation of railroad trains through public places, and the terrible destruction of human life consequent upon negligent operation, warrant special legislation imposing on railroad companies duties not required of any other corporation; and such legislation, when challenged, has uniformly been sustained by the courts as a valid exercise of the police power for the protection of the life, safety, and property of the citizens.⁸² The statutes embrace a variety of details too great for enumeration, some of which are to be found in legislative acts, and others in municipal ordinances passed under legislative authority. As illustrations may be mentioned the following: Requiring a vigilant lookout ahead from the locomotive window,⁸³ and headlights and signal lights at night;⁸⁴ requiring the use of automatic air brakes connected with the locomotive, and under control of the engineer;⁸⁵ requiring daily track inspection,

⁸² *THORPE v. RAILROAD CO.*, 27 Vt. 140, 62 Am. Dec. 625; *California v. Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *McKeon v. Railroad Co.*, 75 Conn. 343, 53 Atl. 656; *Lyon v. Gombret*, 189 U. S. 508, 23 Sup. Ct. 853, 47 L. Ed. 922; *Kansas Pac. Ry. Co. v. Mower*, 16 Kan. 573; *People v. Railroad Co.*, 70 N. Y. 569; *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Wilder v. Railroad Co.*, 65 Me. 332, 20 Am. Rep. 698.

⁸³ *Central of Georgia Ry. Co. v. Dumas*, 131 Ala. 172, 30 South. 867; *Nashville & C. R. Co. v. Nowlin*, 1 Lea (Tenn.) 523.

⁸⁴ *Bohan v. Railroad Co.*, 58 Wis. 30, 15 N. W. 801; *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71; *Alabama G. S. R. Co. v. Moody*, 92 Ala. 280, 9 South. 238; *Rascher v. Railway Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447.

⁸⁵ *Forbes v. Railroad Co.*, 76 N. C. 454; *Johnson v. Southern Pacific Co.*, 117 Fed. 462, 54 C. C. A. 508; Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1903, p. 367].

and even more frequent in peculiarly dangerous places;⁸⁶ forbidding grade crossings in populous communities;⁸⁷ requiring gates and guards on thronged streets;⁸⁸ forbidding the crossing of another railroad without first coming to a dead stop;⁸⁹ forbidding the blocking of highway crossings above a fixed number of minutes;⁹⁰ requiring, in case of danger from an obstruction on the track, the use of all means to stop the train to prevent an accident;⁹¹ the regulation of speed in urban communities;⁹² requiring bell or whistle signals on approaching highway crossings;⁹³ requiring the making and keeping safe crossings for highways over its track,⁹⁴ and maintaining the entire highway on its right of way;⁹⁵ requiring the reconstruction of the railroad so as to prevent grade cross-

⁸⁶ *Smith v. Railroad Co.*, 67 N. J. Law, 636, 52 Atl. 634, 59 L. R. A. 302.

⁸⁷ *New York & N. E. R. Co.'s Appeal from Railroad Com'rs*, 62 Conn. 527, 26 Atl. 122; *Id.*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269.

⁸⁸ *Ante*, § 122, n. 75.

⁸⁹ *Downey v. Railroad*, 161 Pa. 588, 29 Atl. 126.

⁹⁰ *Town of Mason v. Railroad Co.*, 51 W. Va. 183, 41 S. E. 418; *Anderson v. Railroad Co.*, 81 Miss. 587, 33 South. 840.

⁹¹ *South & N. A. R. Co. v. Williams*, 65 Ala. 74. *Pack of hounds, Fink v. Evans*, 95 Tenn. 413, 32 S. W. 307.

⁹² *City of Plattsburg v. Hagenbush*, 98 Mo. App. 669, 73 S. W. 725; *Houston, E. & W. T. R. Co. v. Powell* (Tex. Civ. App.) 41 S. W. 695; *Washington Southern Ry. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Meyers v. Railroad Co.*, 57 Iowa, 555, 10 N. W. 896, 42 Am. Rep. 50; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190.

⁹³ *Ft. Worth & R. G. Ry. Co. v. Greer*, 29 Tex. Civ. App. 561, 69 S. W. 421; *Curtis v. Railway Co.*, 26 Tex. Civ. App. 304, 63 S. W. 149; *Northern Pac. Ry. Co. v. Spike*, 121 Fed. 44, 57 C. C. A. 384; *Western Union R. Co. v. Fulton*, 64 Ill. 271; *Pittsburg, C. & St. L. Ry. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73.

⁹⁴ *Cook v. Railroad Co.*, 125 Mass. 57; *Baltimore & O. S. W. R. Co. v. State*, 159 Ind. 510, 65 N. E. 508; *City of Zanesville v. Fannan*, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664.

⁹⁵ *Boston & M. R. Co. v. Com'rs*, 79 Me. 386, 10 Atl. 113.

ings or other extraordinary dangers;⁹⁶ regulating the wages and hours of employes;⁹⁷ and other like provisions to promote the public safety.⁹⁸

Public Comfort and Convenience.

Among the regulations to augment the public convenience and comfort which have received judicial approval may be mentioned statutes establishing stations, even to the extent of requiring the company to exercise its power of eminent domain to do so;⁹⁹ requiring passenger stations and ticket offices to be open a prescribed length of time before the arrival of trains;¹⁰⁰ requiring drinking water and closets on passenger coaches;¹⁰¹ requiring separate coaches for white and colored persons;¹⁰² forbidding the running of freight trains on Sun-

⁹⁶ *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269.

⁹⁷ *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746.

⁹⁸ *Town of Clarendon v. Railroad Co.*, 75 Vt. 6, 52 Atl. 1057; *Fences, Cincinnati, N. O. & T. P. Ry. Co. v. Stonecipher*, 95 Tenn. 314, 32 S. W. 208; *Kelver v. Railroad Co.*, 128 N. Y. 865, 27 N. E. 553. Act of Congress requiring cars used in interstate commerce to be equipped with automatic couplers, *Voelker v. Railroad Co. (C. C.)* 116 Fed. 867.

⁹⁹ *Dolan v. Railroad Co.*, 175 N. Y. 367, 67 N. E. 612; *City of Worcester v. Railroad Co.*, 109 Mass. 103.

But as to lack of requirement in this respect at common law, see *Page v. Railroad Co.*, 129 Ala. 232, 29 South. 676.

¹⁰⁰ *Brady v. State*, 15 Lea (Tenn.) 628; *Louisville & N. R. Co. v. Commonwealth*, 102 Ky. 300, 43 S. W. 458, 53 L. R. A. 149.

¹⁰¹ *Louisville & N. R. Co. v. Commonwealth*, 20 Ky. Law Rep. 100, 45 S. W. 362; *Id.*, 103 Ky. 605, 45 S. W. 880.

¹⁰² *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; *Bowie v. Electric Co.*, 125 Ala. 397, 27 South. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 24; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432. But an act excepting an officer in charge of a prisoner from the provisions of the separate coach law creates an exception in favor of the officer only. *Louisville & N. R. Co. v. Catron*, 102 Ky. 323, 43 S. W. 443.

day;¹⁰³ requiring live stock in transit to be fed and watered daily;¹⁰⁴ committing the supervision of railroad operations to a board of commissioners and imposing the expense upon the railroad companies;¹⁰⁵ requiring connection with other railroads and hauling of their cars;¹⁰⁶ and, in general, whatever will provide necessities and conveniences for the traveling public and shippers by rail.¹⁰⁷

Exactions and Discriminations.

Increasing commerce and improved methods of railroading in modern times have stimulated railway combinations, and disclosed tendencies to abolish competition and establish monopolies in transportation, with increased facilities for unjust discrimination and extortionate charges for transportation. To prevent such untoward results, many states have established railroad commissions with powers of visitation, and passed acts reducing charges for transportation; and forbidding rebates; a greater charge for a short haul than for a long one over the same route; and other modes of unjust discrimination. Congress, also, in 1887, in the exercise of its express power to regulate commerce between the states, passed an act creating an interstate commerce commission, and regulating interstate commerce by numerous provisions intended to prevent the evils consequent upon unlawful combination and monopoly. Since

¹⁰³ *State v. Railroad Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

¹⁰⁴ *International & G. N. Ry. Co. v. McRae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926; *Toledo, W. & W. Ry. Co. v. Thompson*, 71 Ill. 434; *Comer v. Railroad Co.*, 52 S. C. 36, 29 S. E. 637; *United States v. Harris*, 85 Fed. 533, 29 C. C. A. 327.

¹⁰⁵ *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051. Expense of safety bars ordered by railroad commission, *Detroit, Ft. W. & B. I. Ry. Co. v. Commissioners*, 127 Mich. 219, 86 N. W. 842, 62 L. R. A. 149.

¹⁰⁶ *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 825.

¹⁰⁷ *Stopping train, Delamatyr v. Railroad Co.*, 24 Wis. 578; *Black v. Railroad Co.*, 108 N. Y. 640, 15 N. E. 389; *Fuller v. Railroad Co.*, 21 Conn. 557.

this date the state legislation has by judicial construction been confined exclusively to matters of transportation in a single state;¹⁰⁸ and the acts passed by state legislatures before as well as since the Interstate Commerce Act are held invalid in so far as they interfere either directly or indirectly with interstate commerce, upon the ground that such subjects, having been legislated upon by the federal government, are now within its jurisdiction.¹⁰⁹ State commissions and regulations, however, continue in authority over purely local transportation.¹¹⁰

The Sherman Act.

In furtherance of interstate commerce regulation, Congress, in 1890, passed an act commonly called the "Sherman Act,"¹¹¹ forbidding the formation of combinations by railroad companies or their shareholders for the purpose of monopolizing any portion of interstate commerce. This act, as well as the Interstate Commerce Act, has been challenged for unconstitutionality in both state and federal courts; but in the celebrated recent Northern Securities Case¹¹² its constitutionality was sustained by a majority decision of the Supreme Court of the United States, the law being declared by the Justice¹¹³ giving

¹⁰⁸ *Carton v. Railroad Co.*, 59 Iowa, 148, 13 N. W. 67, 44 Am. Rep. 672; *Hardy v. Railroad Co.*, 32 Kan. 698, 5 Pac. 6.

¹⁰⁹ *Hanley v. Railroad Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; *Pelk v. Railroad Co.*, 94 U. S. 164, 24 L. Ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 90; *Cincinnati, N. O. & T. P. R. Co. v. Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935.

¹¹⁰ *Louisville & N. R. Co. v. Commissioners (O. C.)* 19 Fed. 679; *Heiserman v. Railroad Co.*, 63 Iowa, 732, 18 N. W. 903; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 280, 42 L. Ed. 688; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416.

¹¹¹ Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

¹¹² *NORTHERN SECURITIES CO. v. UNITED STATES*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

¹¹³ Four justices broadly affirmed and four others denied the application of the act to the syndicate operation involved; while Brew-

the deciding opinion to be a valid regulation to prevent the unreasonable restraint of trade from the misuse of corporate powers by railway corporations or a majority of their stockholders.

Interstate Commerce Act.

Among the provisions of the Interstate Commerce Act¹¹⁴ and of laws of various states for local railway regulations are found: (1) Requirements that all charges for transportation shall be reasonable, just, and equal, without rebate or undue preference; and every carrying company shall publish rates for transportation, and adhere to them, with power to advance or reduce them only on due notice;¹¹⁵ that railway officials must, on lawful inquisition, disclose any unlawful practices by railroads, of which they have knowledge, and even to which they have been parties, they being thereby exempted from prosecution therefor.¹¹⁶ (2) Forbidding pooling, unequal discriminations between connecting carriers; advance or reduction of rates without notice; a greater charge for a short haul "under substantially similar circumstances and conditions" than for a long haul which includes the short one; all rebates or undue preferences.¹¹⁷ (3) Permitting a reduction of charges

er, J., was of opinion that the Northern Securities Company was "an unreasonable combination in restraint of interstate commerce, and therefore unlawful"; and the decree of dissolution was thus affirmed. *Id.*, page 361, 193 U. S., page 466, 24 Sup. Ct., 48 L. Ed. 679.

¹¹⁴ Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]; Act March 2, 1889, c. 382, 26 Stat. 855; Act Feb. 10, 1891, c. 128, 26 Stat. 743 [U. S. Comp. St. 1901, p. 3163]; Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]; Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1903, p. 363].

¹¹⁵ *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393; *Thayer v. Burchard*, 90 Mass. 519.

¹¹⁶ *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

¹¹⁷ *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. See *Interstate Commerce Commission v. Railroad Co.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306.

in favor of charitable or public objects;¹¹⁸ lower charges for train loads than for car loads and for car-load lots than for smaller consignments;¹¹⁹ companies to make their own schedules of rates, commissions to revise them, and alter if unjust or unreasonable.¹²⁰

Public Use Warrants Public Regulation.

All these items of regulation intended to prevent the injustice resulting from conduct or acts of discrimination and extortion have been sustained as valid regulations of commerce by the decisions of the state and federal courts, cited under each topic. From the earliest American case¹²¹ on railroad regulation down to the recent Northern Securities Case,¹²² the constant current of judicial decision with varying force has been towards the fundamental doctrines that wherever property is devoted to public use it is subject to public regulation; and the measure of that regulation is the public safety and welfare.¹²³

¹¹⁸ RAGAN v. AIKEN, 9 Lea (Tenn.) 609, 42 Am. Rep. 639; Concord & P. R. R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181.

¹¹⁹ Interstate Commerce Commission v. Railroad Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; Union Pac. R. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986.

¹²⁰ Cincinnati, N. O. & T. P. R. Co. v. Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Same parties reversed, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; Interstate Commerce Commission v. Railway Co. (C. C.) 76 Fed. 183.

¹²¹ Louisville, C. & C. R. Co. v. Chappell (1838) Rice (S. C.) 383.

¹²² Ante, notes 112, 113.

¹²³ WOODFOLK v. RAILROAD CO. (1852) 2 Swan (Tenn.) 422; East Tennessee & G. R. Co. v. St. John (1858) 5 Sneed (Tenn.) 524, 73 Am. Dec. 149; THORPE v. RAILROAD CO. (1854) 27 Vt. 140, 62 Am. Dec. 625; Pittsburgh, C. & St. L. Ry. Co. v. Brown (1879) 67 Ind. 45, 33 Am. Rep. 73; CHICAGO, B. & Q. R. CO. v. IOWA (1876) 94 U. S. 155, 24 L. Ed. 94; State of California v. Railroad Co. (1888) 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; Lake Shore & M. S. R. Co. v. Ohio (1898) 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; NORTHERN SECURITIES CO. v. UNITED STATES (1904) 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

MUNICIPAL REGULATION.

196. Municipal corporations, under delegation from the state, may regulate the operations of railroads within their boundaries to the extent of the power conferred upon them.

The legislative department, as the depository of the police power of the state¹²⁴ and the political guardian of the public safety and welfare,¹²⁵ generally exercises public control and regulation of corporations by statutes fixing the limits of corporate power, and prescribing the public duties to be performed by them. But, as we have heretofore seen,¹²⁶ such power as to affairs within the corporate limits may be delegated to municipalities, either in whole or in part, expressly or by necessary implication. The power may be expressly conferred in the charter or by general statutes; and it will be implied in favor of all municipalities vested with police power and the power of street regulation.¹²⁷ In such cases the municipalities may regulate railroad corporations within their boundaries whenever the state has failed to exercise its inherent right of regulation.¹²⁸

Commercial Roads.

A grant of power to construct a railroad along a street does not exist in a municipality unless plainly given by the legislature.¹²⁹ It is not a necessary incident to the maintenance of

¹²⁴ *McKibbin v. Ft. Smith*, 35 Ark. 352; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

¹²⁵ *City of Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605; *Tucker v. Virginia City*, 4 Nev. 20; *Aaron v. Brolles*, 64 Tex. 316, 53 Am. Rep. 764.

¹²⁶ *Ante*, § 116.

¹²⁷ *Atchison St. Ry. Co. v. Railway Co.*, 31 Kan. 661, 3 Pac. 284; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Illinois Cent. R. Co. v. Galena*, 40 Ill. 344.

¹²⁸ *Ante*, § 122.

¹²⁹ *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069.

derogation of the right of the company,¹⁴⁰ save only in the exercise of the police power,¹⁴¹ which may not be bargained away by either city or state.¹⁴²

Franchises and Licenses.

Franchises, being public privileges granted by the sovereign, are usually found expressed in the charter of the railway corporation. The power to exercise these franchises from the state is usually dependent upon the municipal consent, generally called "license." Franchise and license are both obviously necessary for the operation of a street railway.¹⁴³ The license given by the municipality may be revoked at any time before it has been acted upon by the company;¹⁴⁴ but after the company has accepted the license and acted upon it it is irrevocable,¹⁴⁵ and becomes a part of the franchise. The municipality may give or refuse its consent to the exercise of the franchise. It may give it absolutely or conditionally. When the ordinance containing the conditions and granting the license is acted upon by the company, it is under obligation to comply with those conditions as fully as though they were expressed in the char-

¹⁴⁰ *CITY OF DETROIT v. RAILWAY CO.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *City of Cleveland v. Railroad Co.* (May 31, 1904) 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102.

¹⁴¹ *Cooley*, Const. Lim. (8th Ed.) 708-710; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. Ed. 710.

¹⁴² *THORPE v. RAILROAD CO.*, 27 Vt. 140, 62 Am. Dec. 625; *BOSTON BEER CO. v. MASSACHUSETTS*, 97 U. S. 25, 24 L. Ed. 989; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

¹⁴³ *Union Trust Co. v. Railroad Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *City of Detroit v. Railway Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *City of Belleville v. Railway Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118.

¹⁴⁴ *Cook v. Stearns*, 11 Mass. 533; *Foot v. Railroad Co.*, 23 Conn. 214.

¹⁴⁵ *McAulay v. Railroad Co.*, 33 Vt. 311, 78 Am. Dec. 627; *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 178, 23 N. W. 432; *Richards v. Railroad Co.*, 137 Pa. 524, 19 Atl. 931, 21 Am. St. Rep. 892; *Brooklyn Cent. R. Co. v. Railroad Co.*, 32 Barb. (N. Y.) 358.

ter as conditions of the franchise.¹⁴⁶ Indeed, it is not uncommon to call the power so conferred upon street railways by a municipality a franchise.¹⁴⁷

Electric or Horse Power.

A street railway company adapted for carrying passengers and parcels, making frequent stops for taking on and discharging them, is a great public convenience. Such a railway using horse power has been recognized for nearly a century as an appropriate use of the highways of New York.¹⁴⁸ Electric power, by giving greater speed and propelling larger and heavier cars, has increased the dangers of street railways; and the planting of poles and the stringing of wires has operated to the disadvantage of the public and also of abutting owners. But the courts, in recognition of the public demand for greater speed and increased facilities of locomotion, have generally held the application of electricity to street railways not to be a new servitude,¹⁴⁹ and sustained the municipal licenses granted to horse car companies to use electric power.¹⁵⁰ In the same spirit it has been held that a through railroad company, licensed to occupy the streets for the transportation of passen-

¹⁴⁶ *Campbell v. Railroad Co.*, 175 Mo. 161, 75 S. W. 86; *Hovelman v. Railroad Co.*, 79 Mo. 632; *City R. Co. v. Railroad Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

¹⁴⁷ *Johnson v. New Orleans*, 105 La. 149, 29 South. 355; *People v. Railroad Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

¹⁴⁸ The Bowery Horse Railroad was laid in 1831.

¹⁴⁹ *Imlay v. Railroad Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

¹⁵⁰ *Lockhart v. Railway Co.*, 139 Pa. 419, 21 Atl. 26; *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; *Taggart v. Railway Co.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; *City of Detroit v. Railroad Co. (C. C.)* 56 Fed. 874; *Street Ry. Co. v. Doyle*, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933.

But see *Bonham v. Railroad Co.*, 158 Ind. 106, 62 N. E. 996, where it was held that speed ordinances passed regulating the operation of a horse railroad company were not applicable to its successor in operating its cars by electricity.

gers only, cannot use them for hauling freight;¹⁵¹ nor can a street railway use its tracks for the sole purpose of hauling freight cars.¹⁵² But it has also been held that a street railway may haul freight as well as passengers.¹⁵³

Miscellaneous.

Municipalities may require street railway companies to warm passenger stations in cold weather sufficiently for the health and comfort of passengers;¹⁵⁴ to keep the surface of the street occupied by it in good repair;¹⁵⁵ also to sprinkle it;¹⁵⁶ and to pave it, or assist therein;¹⁵⁷ and generally to do such other acts as are necessary for the public convenience and safety.¹⁵⁸

JUDICIAL POWER.

198. The courts contribute their aid to the regulation of railroads chiefly through the writs of mandamus and injunction, whereby the performance of public duties is enforced, and the abuse or usurpation of corporate powers is effectually prevented.

¹⁵¹ *St. Louis & M. R. R. Co. v. Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300.

¹⁵² *South & N. A. R. Co. v. Railroad Co.*, 119 Ala. 105, 24 South. 114.

¹⁵³ *Newell v. Railway Co.*, 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; *State v. Traction Co.*, 64 Ohio St. 272, 60 N. E. 291; *Aycock v. Association*, 26 Tex. Civ. App. 341, 63 S. W. 953.

¹⁵⁴ *St. Louis, I. M. & S. Ry. Co. v. Willson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; *Page v. Railroad Co.*, 129 Ala. 232, 29 South. 676.

¹⁵⁵ *City of Chicago v. Traction Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; *Village of Mechanicville v. Railway Co.*, 67 App. Div. 628, 74 N. Y. Supp. 1149; *Milbau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Story v. Railroad Co.*, 90 N. Y. 158, 43 Am. Rep. 146.

¹⁵⁶ *State v. Railroad Co.*, 50 La. Ann. 1189, 24 South. 265, 56 L. R. A. 287.

¹⁵⁷ *Fielders v. Railway Co.*, 67 N. J. Law, 76, 50 Atl. 533; *City of Philadelphia v. Railway Co.*, 7 Phila. (Pa.) 321.

¹⁵⁸ *Reynolds v. Naudain*, 2 Har. (Del.) 317.

The regulation of railroads is peculiarly a legislative function, and is therefore usually provided for by statutes and municipal ordinances; but laws are frequently disobeyed—the legal requirements are not performed—and the aid of courts is often necessary to effectuate the public regulation of railroads. Even when railroad commissions, in the exercise of their plenary powers of regulation, come, as they often do, upon debatable ground, the railroad companies may appeal to the courts for their protection.¹⁵⁹ So, too, when the companies fail or refuse to perform their public duties, and the commissions fail to exercise their lawful powers, or are not sufficiently empowered for the purpose, the aid of the courts may be invoked by the commission¹⁶⁰ or the party injured¹⁶¹ to declare the delinquency of the company, or the illegality of its conduct, and to apply the proper remedy to enforce the law. The writs usually employed for these purposes are mandamus,¹⁶² to compel the performance of a legal duty; and injunction,¹⁶³ to prevent the company from abusing its lawful powers or usurping powers not conferred upon it.

Illustrations.

For example, if a solvent railroad company refuse to operate the whole or any part of its railroad system, it may be compelled to exercise its public franchise and perform its public

¹⁵⁹ CHICAGO, M. & ST. P. RY. CO. v. MINNESOTA, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

¹⁶⁰ Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

¹⁶¹ Currier v. Railroad Corp., 48 N. H. 321; State v. Railway Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739.

¹⁶² People v. Railway Co., 14 Hun (N. Y.) 371; Inhabitants of Cambridge v. Railroad Co., 7 Metc. (Mass.) 70; State v. Railway Co., 39 Minn. 219, 39 N. W. 153; State v. Gorham, 37 Me. 451.

¹⁶³ Hinchman v. Railroad Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Brainard v. Railroad Co., 7 Cush. (Mass.) 506; Currier v. Railway Co., 6 Blatch. (U. S.) 487, Fed. Cas. No. 3,493; Sparhawk v. Railway Co., 54 Pa. 401.

function by the writ of mandamus;¹⁶⁴ or its charter might be forfeited by quo warranto proceedings.¹⁶⁵ So, too, if a railway company attempt without the consent of the state to alienate its franchise to construct and operate a railroad, such alienation may be forbidden by injunction;¹⁶⁶ and the company to which the franchise was granted for the public use may be compelled by mandamus to perform its duty;¹⁶⁷ or its charter might be forfeited by quo warranto proceedings instituted by the attorney general for that purpose.¹⁶⁸ So, too, mandamus may be used to compel a railroad company to re-establish a station; or, under law, to locate a new station,¹⁶⁹ to construct, repair, or operate its railroad.¹⁷⁰ And injunction may be employed to

¹⁶⁴ *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *People v. Railroad Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

¹⁶⁵ *Ohio & M. Ry. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *People v. Road Co.*, 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

¹⁶⁶ *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *State v. Railroad Co.*, 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295.

¹⁶⁷ *Appeal of Stewart*, 56 Pa. 413; *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

¹⁶⁸ *State v. Railroad Co.*, 116 Wis. 142, 92 N. W. 546; *People v. Railway Co.*, 117 Cal. 604, 49 Pac. 736; *Attorney General v. Railroad Co.*, 28 N. C. 456.

¹⁶⁹ *State v. Railway Co.*, 89 Minn. 363, 95 N. W. 297; *Same v. Same* (Minn.) 96 N. W. 81; *City of Worcester v. Railroad Co.*, 109 Mass. 103.

But the common law does not impose upon a railroad company the duty of establishing and maintaining a comfortable waiting room for those intending to become passengers, and no such duty exists unless imposed by charter, or some other statutory regulation. *Page v. Railroad Co.*, 129 Ala. 232, 29 South. 676; *Montgomery & E. Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *People v. Railroad Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; *Northern Pac. R. Co. v. Washington*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *Nashville, C. & St. L. R. Co. v. State*, 137 Ala. 439, 34 South. 401.

¹⁷⁰ *People v. Railroad Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; *State v. Gorham*, 37 Me. 451; *State v. Railway Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739.

prevent the fraudulent change of a location;¹⁷¹ a misuse of rights in the highway;¹⁷² a resumption of an abandoned franchise;¹⁷³ or the building on an illegal location;¹⁷⁴ and by mandatory injunction the company may be compelled to accept goods;¹⁷⁵ to receive cars;¹⁷⁶ to restore the highway.¹⁷⁷

¹⁷¹ *Chapman v. Railroad Co.*, 6 Ohio St. 119.

¹⁷² *Birmingham Traction Co. v. Telephone Co.*, 119 Ala. 144, 24 South. 731.

¹⁷³ *Wright v. Light Co.*, 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74.

¹⁷⁴ *Fall River Iron Works Co. v. Railroad Co.*, 5 Allen (Mass.) 221.

¹⁷⁵ *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387.

¹⁷⁶ *Louisville & N. R. Co. v. Coal Co.*, 111 Ky. 960, 64 S. W. 969, 22 Ky. Law Rep. 1318, 55 L. R. A. 601.

¹⁷⁷ *Grey v. Traction Co.*, 56 N. J. Eq. 463, 40 Atl. 21.

CHAPTER XXII.**ELECTRIC COMPANIES.**

- 199. Telegraphs and Telephones.
- 200. Federal Control.
- 201. State Control.
- 202. Limitations.
- 203. Eminent Domain.
- 204. Municipal Control.
- 205. Construction and Operation.
- 206. Electric Light Companies.

TELEGRAPHS AND TELEPHONES.

199. Telegraph and telephone companies are quasi public corporations in that

- (1) They are public benefits to which all persons applying are entitled on equal terms and without discrimination.**
- (2) They have highway franchises and the power of eminent domain.**

The telegraph rapidly transmits written words; the telephone rapidly conveys words spoken. Both are designed and used for the same purpose—the speedy intercommunication of thought between distant points. Both are operated by electricity on wires, and are intended for public use. They exist under the same conditions, supply the same social wants, and are subject to the same natural laws. Recognition of these facts has led legislatures and courts to regard them as subject to the same rules and doctrines of law. The telegraph, as the elder child of invention, was the object of legal consideration and provision for forty years before its younger sister, the telephone, was born. During that period many statutes were passed and decisions made having reference solely to the telegraph, so that by the year 1880 there was a body of

law fairly well formulated and digested controlling telegraph companies in their relations to the public. During the last twenty-five years, by homologation rather than legislation, telephone companies have been brought within the scope of this body of law; so that now, with the single discordant exception of the federal Post Roads Act,¹ telegraphs and telephones seem to occupy identical positions and relations in the eye of the law.²

Telegraph Includes Telephone.

Telephone companies have been held to be lawfully organized under general statutes enacted, before the invention of the telephone, to incorporate "telegraph companies";³ and under statutes authorizing the exercise of the power of eminent domain by "telegraph companies" the courts have condemned a right of way for telephone companies.⁴ So, statutes regulating "telegraph companies" include also telephone companies.⁵

¹ Rev. St. U. S. § 5263 et seq. [U. S. Comp. St. 1901, p. 3579].

² Wisconsin Telephone Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; Cumberland Telegraph & Telephone Co. v. Railway Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544; City of Richmond v. Telegraph Co., 85 Fed. 19, 28 C. C. A. 659; Cincinnati Inclined Plane Ry. Co. v. Association, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. Rep. 559.

³ HUDSON RIVER TEL. CO. v. RAILWAY CO., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; York Telephone Co. v. Keeseey, 5 Pa. Dist. Ct. Rep. 366.

⁴ Gulf, C. & S. F. Ry. Co. v. Telephone Co., 18 Tex. Civ. App. 500, 45 S. W. 151; Southwestern Telegraph & Telephone Co. v. Railroad Co. (Tex. Civ. App.) 52 S. W. 106; Mobile & O. R. Co. v. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; Duke v. Telegraph Co., 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; Northwestern Telephone Exch. Co. v. Railway Co., 76 Minn. 334, 79 N. W. 315. In the last case the court said: "The rule is, when applying the principles of the common law, or when construing statutes, that the telephone is to be considered a telegraph, unless express statutory provisions govern. So telephone companies, when establishing their lines, have the right of eminent domain, under the Constitution and laws, to the same extent as have telegraph companies."

⁵ Southwestern Telegraph & Telephone Co. v. Railroad Co. (Tex.

Likewise, statutes for assessing and taxing telegraph lines, and providing for service of process upon telegraph companies, include telephone companies.⁶ Inventor Bell, in his specifications for a patent, claimed to "transmit vocal or other sounds telegraphically";⁷ and the courts have accepted this scientific expression as a proper basis for interpretation of the word "telegraph" found in the old statutes so as to make it include telephones; with the single exception that the Supreme Court of the United States,⁸ in applying the Post Roads Act in favor of telegraphs, declined to so construe it as to give the benefit thereof to telephone companies. Noting this unique exception, the word "telegraph" will hereinafter be understood as including telephones.

Common Carriers of News and Intelligence.

Telegraph companies, by most of the courts, have been declared not to be strictly common carriers, and therefore not subject to the doctrines of the common law on this subject.⁹ They have also been held by the Supreme Court of the United States not to be bailees.¹⁰ These decisions rest upon the

Civ. App.) 52 S. W. 106; *CHESAPEAKE & P. TELEGRAPH CO. v. TELEGRAPH CO.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

⁶ *Iowa Union Telegraph Co. v. Board*, 67 Iowa, 250, 25 N. W. 155; *Franklin v. Telephone Co.*, 69 Iowa, 97, 28 N. W. 461.

⁷ *THE TELEPHONE CASES*, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863.

⁸ *City of Richmond v. Telegraph Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

⁹ *MARR v. TELEGRAPH CO.*, 85 Tenn. 529, 3 S. W. 496; *Pinckney v. Telegraph Co.*, 19 S. C. 71, 45 Am. Rep. 765; *Western Union Telegraph Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 2 L. R. A. 601, 10 Am. St. Rep. 630; *Same v. Mellon*, 96 Tenn. 68, 33 S. W. 725; *Grinnell v. Telegraph Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Kiley v. Telegraph Co.*, 109 N. Y. 231, 16 N. E. 75; *Central Union Telephone Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035; *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 600, 10 Am. St. Rep. 699; *Jones v. Telegraph Co.*, 101 Tenn. 442, 47 S. W. 699.

¹⁰ *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883.

ground that the things to be transmitted or carried by telegraph are not goods or chattels, and not subjects of insurance. And yet it is universally conceded that these companies are chartered and organized for the purpose of rendering public service;¹¹ that they are common carriers of news and intelligence;¹² that they must serve without discrimination¹³ every person who applies in conformity with their reasonable rules; and that their performance of these public functions may be regulated and controlled by law for the public welfare.¹⁴ Statutes accordingly have been sustained regulating the rates for messages, and prescribing time and limits for receiving and delivering the same.¹⁵

¹¹ *Croswell, Electricity*, §§ 4-6.

¹² *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Western Union Telegraph Co. v. Publishing Co.*, 44 Neb. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729; *State v. Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Western Union Telegraph Co. v. Allen*, 66 Miss. 549, 6 South. 461; *Same v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

¹³ *State v. Telephone Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *People v. Telegraph Co.*, 19 Abb. N. C. 466; *State ex rel. Payne v. Telephone Co.*, 93 Mo. App. 349, 67 S. W. 684; *CHESAPEAKE & P. TELEGRAPH CO. v. TELEGRAPH CO.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State of Missouri v. Telephone Co. (C. C.)* 23 Fed. 539; *State of Delaware v. Telephone Co. (C. C.)* 47 Fed. 633.

And where a telephone company refuses a subscriber connection through its exchange, when he is properly entitled thereto, it may be forced to do so by mandamus. *Mahan v. Telephone Co. (Mich.)* 93 N. W. 629; *Missouri v. Telephone Co. (C. C.)* 23 Fed. 539.

¹⁴ *Cannon v. Telegraph Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *State v. Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

¹⁵ *Manning v. Chesapeake & Potomac Telephone Co.*, 26 Wash. Law Rep. 499; *Leavell v. Telegraph Co.*, 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721.

Federal Franchise.

In 1866 the Congress passed an act conferring upon telegraph companies organized under laws of any state the right to construct, maintain, and operate lines of telegraph over all post roads of the United States, without discrimination; and in all the states are to be found statutes conferring upon telegraph companies the right to exercise the sovereign power of eminent domain. This power is also given in liberal measure in the territories of the United States by act of Congress. Telegraph companies, therefore, are subjected to public regulation, not only as performing public functions with property devoted to public uses, but also as exercising the power of the sovereign for that purpose; they are accordingly classed as quasi public corporations.¹⁶

FEDERAL CONTROL.

200. The United States exercise a certain measure of protection and regulation over telegraph and telephone companies as instrumentalities of interstate commerce and beneficiaries of federal franchises over all post roads.

The federal Constitution gives the Congress power to "regulate commerce * * * among the several states." This is the basis of the Interstate Commerce Act and Commission, and has been construed to embrace not only trade, but intercourse, between the states.¹⁷ Telegraphs, therefore, as well as railroads, have been brought under congressional authority. The first conspicuous exercise of this authority by Congress was an act passed June 16, 1860, "to facilitate communication between the Atlantic and Pacific states by electric telegraph."¹⁸ Next

¹⁶ *Ellis v. Telegraph Co.*, 13 Allen (Mass.) 226; *PINCKNEY v. TELEGRAPH CO.*, 19 S. C. 71, 45 Am. Rep. 765; *MARR v. TELEGRAPH CO.*, 85 Tenn. 529, 3 S. W. 496.

¹⁷ Const. U. S. art. 1, § 8; *Postal Telegraph & Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *LELOUP v. PORT OF MOBILE*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311.

¹⁸ 12 Stat. 41, c. 137.

followed the Union Pacific Railroad legislation in 1862,¹⁹ whereby was subsidized not only railroad but telegraph lines across the plains, so as to connect the Mississippi Valley with the Pacific Slope. In 1866 Congress manifested its further interest in facilitating telegraphic communication among the states by opening all post roads for the use of telegraph companies,²⁰ thereby enabling them to erect their poles and string their wires wherever the United States mail was carried by rail, vehicle, on horseback, or on foot, in city or country.²¹ The only condition precedent to the exercise of this right was the filing with the Postmaster General of the company's written acceptance of all the restrictions and obligations required by law; which were, in brief, that the lines should not obstruct navigation nor interfere with ordinary travel, and that the government should have priority of right of message at a rate to be fixed annually by the Postmaster General.²² The act applied to any telegraph companies then or thereafter organized under the laws of any state, but did not assume to confer the power of eminent domain upon any of them. Its purpose was to confer a valuable franchise upon telegraph companies to promote intercourse "among the several states."²³

¹⁹ 12 Stat. 489, c. 120.

²⁰ Rev. St. U. S. § 5263 [U. S. Comp. St. 1901, p. 3579].

²¹ *United States v. Telegraph Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; *PENSACOLA TELEGRAPH CO. v. TELEGRAPH CO.*, 96 U. S. 1, 24 L. Ed. 708; *City of St. Louis v. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Mercantile Trust Co. v. Railway Co.* (C. C.) 63 Fed. 513; *Western Union Telegraph Co. v. Mayor* (C. C.) 38 Fed. 552, 3 L. R. A. 449.

²² *Chicago & A. Bridge Co. v. Telegraph Co.*, 36 Kan. 113, 12 Pac. 535; *City and County of San Francisco v. Telegraph Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301.

²³ *PENSACOLA TELEGRAPH CO. v. TELEGRAPH CO.*, 96 U. S. 1, 24 L. Ed. 708; *City of St. Louis v. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Postal Telegraph Co. v. Railroad Co.* (C. C.) 94 Fed. 234.

Federal Agents.

The acceptance of these franchises by telegraph companies has the effect of making them instrumentalities of interstate commerce, and therefore subject to federal control and regulation, as well as to make them agents for the transaction of federal business.²⁴ It also renders void any exclusive contract between telegraph and railway companies, and invalidates any state laws which operate to unfairly impede telegraph companies in the exercise of these federal franchises and duties;²⁵ and Congress may regulate the rates for interstate messages over any of these lines.²⁶ They may also claim federal protection against any hostile state legislation which will impair their lawful powers as federal agencies, or their utility as public servants in promoting interstate commerce.²⁷

STATE CONTROL.

201. The state, in the exercise of its inherent powers of sovereignty over all persons and things within its boundaries, may regulate and control all telegraph and telephone companies operating within the limits of its territorial jurisdiction, whether under domestic or foreign charter, in all purely local affairs of a public nature.

²⁴ *Western Union Telegraph Co. v. Charleston* (C. C.) 56 Fed. 419; *Same v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

²⁵ *City of Ogden v. Crossman*, 17 Utah, 66, 53 Pac. 985; *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570; *Moore v. Eufaula*, 97 Ala. 670, 11 South. 921; *Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

²⁶ *PENSACOLA TELEGRAPH CO. v. TELEGRAPH CO.*, 96 U. S. 1, 24 L. Ed. 708.

²⁷ *Western Union Telegraph Co. v. Charleston*, 56 Fed. 419; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Same v. Alabama*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409; *Same v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1034, 41 L. Ed. 49.

The state confers upon telegraph companies the sovereign power of eminent domain as well as their charter franchises.²⁸ Many messages are sent which do not cross state lines, and are of interest only to the residents of a single state. In sending such messages the company is performing a public duty, and is subject to public regulation; but not by Congress, for its power is confined to interstate commerce. The state, therefore, in the exercise of its inherent powers of sovereignty, may control and regulate this public business just as it may that of railroads.²⁹ It may regulate rates.³⁰ It may compel equal facilities to be furnished to all applicants, without discrimination, both for telegraph messages and telephone rentals.³¹ It may regulate the setting of poles and stringing of wires along the public highway,³² and generally may exercise such fur-

²⁸ *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Dally v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Western Union Telegraph Co. v. Telegraph Co. (C. C.)* 19 Fed. 660; *St. Louis & C. R. Co. v. Telegraph Co.*, 173 Ill. 508, 51 N. E. 382.

²⁹ *Western Union Telegraph Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910; *City of St. Louis v. Western Union Telegraph Co.*, 149 U. S. 468, 13 Sup. Ct. 990, 37 L. Ed. 810; *American Rapid Telephone Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764; *Irwin v. Telegraph Co.*, 37 La. Ann. 63.

³⁰ *Missouri v. Telephone Co. (C. C.)* 23 Fed. 539; *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *State v. Telegraph Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570.

³¹ *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Gillis v. Telegraph Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; *De Rutte v. Telegraph Co.*, 1 Daly (N. Y.) 547; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Western Union Telegraph Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443.

³² *Nebraska Telephone Co. v. Telephone Co. (Neb.)* 95 N. W. 18; *CITY OF ST. LOUIS v. TELEGRAPH CO.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810; *People v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *Western Union Telegraph Co. v. Mayor*, 38 Fed. 552, 3 L. R. A. 449.

ther regulations under the police power as may be necessary for the public safety;³³ or it may confer the power of local regulation of local telegraphs, and especially of telephones, upon the municipal governments of the state.³⁴

LIMITATIONS.

202. The state control is limited by the federal Constitution as to matters over which

- (a) The exclusive power is granted to Congress.**
- (b) A potential faculty is conferred upon it.**

It is obvious from the two preceding sections that telegraph and telephone companies, as quasi public corporations receiving franchises from and owing duties to both state and federal governments, are subjects of a double control. But it is not to be understood therefrom that both governments may exercise control in the same matter. The field and domain of each is separate. The jurisdiction of the United States is confined to interstate commerce and federal agency, while the state retains all the inherent powers of local sovereignty. It is clear, therefore, that the state has no power over matters of federal agency, which belong exclusively to the United States. Confusion has existed, however, and discordant decisions have been rendered in the state and federal courts over alleged interstate commerce power. For nearly a hundred years the states exercised a large measure of control on this subject, because Congress had failed to exercise its potential faculty of regulation. Since the passage of the Interstate Commerce Act, and the assumption thereby of this important faculty by Congress,

³³ *New England Telephone & Telegraph Co. v. Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *City of Houston v. Moore*, 5 Wheat. (U. S.) 49, 5 L. Ed. 19; *Grand Rapids E. L. & P. Co. v. Gas Co.* (C. C.) 32 Fed. 659; *O'Connor v. Pittsburgh*, 18 Pa. 189.

³⁴ *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *City of Eureka v. Willson*, 15 Utah, 58, 48 Pac. 41; *Sinton v. Ashbury*, 41 Cal. 425.

all previous state legislation upon that subject has been declared superseded,³⁵ and subsequent legislation has been held invalid.³⁶ Illustrations of this are to be found in decisions declaring void a statute authorizing an injunction against a telegraph corporation of another state whose taxes are in arrears from pursuing its business within the state until the taxes are paid;³⁷ a statute taxing a federal franchise;³⁸ also one taxing interstate telegraph messages;³⁹ and statutes taxing government messages.⁴⁰ In short, all state statutes which will by their enforcement constitute a material interference with or regulation of interstate commerce or federal power are invalid.⁴¹

EMINENT DOMAIN.

203. The power of eminent domain exercised by electric companies to locate and erect telegraphs and telephones emanates from the state, and is directed by state laws prescribing proceeding and just compensation.

The Supreme Court of the United States has declared that the Congress, in the exercise of its constitutional power to

³⁵ *Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 114, 15 Sup. Ct. 802, 39 L. Ed. 910.

³⁶ *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359.

³⁷ *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

³⁸ *City and County of San Francisco v. Telegraph Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301.

³⁹ *LELOUP v. PORT OF MOBILE*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Ratterman v. Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409.

⁴⁰ *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Telegraph Co. v. Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698.

⁴¹ *Western Union Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Same v. Mayor (C. C.)* 38 Fed. 552, 3 L. R. A. 449.

regulate commerce among the states, may grant charters of incorporation to companies about to engage in interstate commerce;⁴² and also may exercise the power of eminent domain in respect of lands in any territory or state, when necessary to the exercise of the power of regulating interstate commerce;⁴³ and has sustained the validity of an act authorizing the taking of private lands in the states of New York and New Jersey for the purpose of erecting a bridge across the North river.⁴⁴ But this potential faculty has rarely, if ever, been exercised within the states for telegraph companies. It has been ruled by the Supreme Court of the United States that the Post Roads Act does not confer the power of eminent domain upon telegraph companies,⁴⁵ but that those intending the exercise of that power must rely upon the state statutes to obtain their rights of way through the states, whether from private persons or from other corporations. Most of the states have passed laws authorizing telegraph companies to exercise this power in condemning rights of way to their use upon the payment of just compensation.

Just Compensation.

The matter of compensation to various claimants, therefore, has undergone much judicial consideration and produced much discord of decision, especially with regard to the rights of owners of property abutting on the highway. The general rules upon this subject applicable to various claimants may be summarized as follows: A telegraph company occupies the public highway in virtue of its public franchise, without exercising the power of eminent domain or paying the just compensation

⁴² *California v. Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150.

⁴³ *Cherokee Nation v. Railway Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295.

⁴⁴ *Luxton v. Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808.

⁴⁵ *Pensacola Telegraph Co. v. Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708.

provided by Constitution for those whose private property is taken for public use.⁴⁶ Such companies may erect their poles and string their wires along a railroad right of way under the federal franchise given by the Post Roads Act, but must make just compensation to the railway company for the value of the right thus taken.⁴⁷

Abutting Owners.

With regard to abutting owners, the lines of a telegraph or telephone company "are on the same footing as a steam railroad. They become no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compen-

⁴⁶ *Croswell, Electricity*, § 61.

⁴⁷ *Postal Telegraph Cable Co. v. Railroad Co.*, 30 Ind. App. 654, 66 N. E. 919; *Mobile & O. R. Co. v. Cable Co.*, 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; *Atlantic & P. Telegraph Co. v. Railroad Co.*, 6 Biss. (U. S.) 158, Fed. Cas. No. 632; *Postal Telegraph Cable Co. v. Steamship Co.*, 49 La. Ann. 58, 21 South. 183.

See *Western Union Telegraph Co. v. Railroad Co.* (C. C.) 120 Fed. 362; *Id.*, 123 Fed. 33, 59 C. C. A. 113, where, under a Pennsylvania statute giving authority to erect and construct devices, works, fixtures, and structures along and across any of the roads within the state, upon the termination of a lease by a telegraph company upon a railroad right of way the superior rights of the railroad company were upheld, and the court decided that property devoted to one public use cannot be taken by another without express legislative authority, expressed in clear terms or by necessary implication.

Many of the states have passed statutes containing provisions similar to those contained in the post roads act. *South Carolina & G. R. Co. v. Telegraph Co.*, 65 S. C. 459, 43 S. E. 970; *Southwestern Telegraph Co. v. Railway Co.*, 109 La. 892, 33 South. 910; *St. Louis & S. F. R. Co. v. Telegraph Co.*, 121 Fed. 276, 58 C. C. A. 198; *Postal Telegraph Cable Co. v. Railroad Co.*, 96 Va. 661, 32 S. E. 468. See, also, *Southwestern Telegraph & Telephone Co. v. Railway Co.* (Tex. Civ. App.) 52 S. W. 106.

The general rule is that land already devoted to another public use cannot be taken under general laws where the effect would be to extinguish a franchise. *Northwestern Telephone Exch. Co. v. Railway Co.*, 76 Minn. 334, 79 N. W. 315.

sation for the additional burden placed upon his land. When the fee is in the public, the abutting owner may recover for any interference with his rights in the street."⁴⁸ Whenever it is necessary to run the line through private property, consent must be obtained from the owner, or the usual proceeding of condemnation be pursued, wherein compensation is included in order to give it validity.⁴⁹ Until compensation is made in such cases the erections are unlawful.⁵⁰ Abutters may obtain their compensation by proceeding under the local law.

MUNICIPAL CONTROL.

204. Municipalities, under authority conferred by the state, may pass and enforce all reasonable ordinances affixing conditions to entering the city, regulating the setting of poles and stringing of wires, and protecting the safety of persons and property in the municipal limits.

The power of municipal corporations over electric companies is only a portion of the power of the state, and exists in such measure as the legislature in its discretion has granted.

⁴⁸ Lewis, Em. Dom. § 131.

The construction and maintenance of a telegraph line on the highway is a new and additional burden on the fee, to which it was not contemplated it should be subjected, and for which the owner is entitled to additional compensation. *Union Electric Telephone & Telegraph Co. v. Applequist*, 104 Ill. App. 517; *Goddard v. Railway Co.*, 104 Ill. App. 526; *Id.*, 202 Ill. 362, 66 N. E. 1066; *Bronson v. Telegraph Co. (Neb.)* 93 N. W. 201, 60 L. R. A. 426; *Andrews v. Telephone Co.*, 36 Misc. Rep. 23, 72 N. Y. Supp. 50.

⁴⁹ *American Telegraph & Telephone Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200.

⁵⁰ *Gray v. State Telephone Co.*, 41 Misc. Rep. 108, 83 N. Y. Supp. 920; *Bronson v. Telegraph Co. (Neb.)* 93 N. W. 201, 60 L. R. A. 426; *Postal Telegraph-Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390. And an injunction will lie to restrain an unauthorized exercise of the power of eminent domain. *St. Louis & S. F. R. Co. v. Telegraph Co.*, 121 Fed. 276, '58 C. C. A. 198.

Usually, municipal corporations have full power over their streets, and also the police power to their boundaries.⁵¹ In most states, too, the statutes require municipal consent for any telephone company to erect its poles or string its wires along the street.⁵² This consent it may refuse, or give freely or upon such terms or conditions as it may see fit to impose.⁵³ And after the construction of the line it may pass such reasonable ordinances for its maintenance and regulation as are necessary for the safety and convenience of its citizens.⁵⁴ It may appoint the lines or limits for setting poles;⁵⁵ forbid the stringing of wires over houses;⁵⁶ and even require them to be placed under ground.⁵⁷ But it does not have the power to prescribe

⁵¹ Ante, §§ 117, 129.

⁵² *Croswell, Electricity*, § 144.

In Kentucky this is a constitutional provision. *Const. Ky. § 163*. See, also, *East Tennessee Telephone Co. v. Telephone Co.*, 24 Ky. Law Rep. 2358, 74 S. W. 218.

A Nebraska statute giving telegraph and telephone companies a right of way along public roads of the state was held not to apply to streets and alleys of a city, and the unauthorized use of such thoroughfares for such purpose a public nuisance. *Nebraska Telephone Co. v. Telephone Co. (Neb.)* 95 N. W. 18.

⁵³ *Western Union Telegraph Co. v. Wakefield (Neb.)* 95 N. W. 659; *Mahan v. Telephone Co. (Mich.)* 93 N. W. 629; *Michigan Telephone Co. v. Charlotte City (C. C.)* 93 Fed. 11.

⁵⁴ *Commonwealth v. Warwick*, 185 Pa. 623, 40 Atl. 93; *Nebraska Telephone Co. v. Light Co.*, 27 Neb. 284, 43 N. W. 126.

But a telephone franchise granted by a city, which is to run under state law for a definite period, may not be nullified during that term by the city, in the absence of any provision therein reserving such right. *Old Colony Trust Co. v. Wichita (C. C.)* 123 Fed. 762.

⁵⁵ *Hutchinson v. Belmar*, 61 N. J. Law, 443, 39 Atl. 643.

⁵⁶ *Electric Imp. Co. v. San Francisco (C. C.)* 45 Fed. 593, 13 L. R. A. 131.

⁵⁷ *City of Geneva v. Telephone Co.*, 30 Misc. Rep. 236, 62 N. Y. Supp. 172; *Western Union Telegraph Co. v. New York (C. C.)* 38 Fed. 552, 3 L. R. A. 449; *Commonwealth v. Warwick*, 185 Pa. 623, 40 Atl. 93; *People v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. See *Chamberlain v. Telephone Co.*, 119 Iowa, 619, 93 N. W. 596.

rates by ordinance, though it may fix them in licenses granted for entering the city.⁵⁸ A subsequent ordinance of regulation must not impair the contract right of the company,⁵⁹ unless required by the public safety or welfare;⁶⁰ but the police power has been held to extend not only to the supervision of the maintenance and operation of the line, but also to requiring the removal of poles from one street to another.⁶¹

CONSTRUCTION AND OPERATION.

205. Telegraph and telephone lines are always to be constructed, maintained, and operated with reference to their federal and state franchises and municipal licenses, and the primary and dominant use of public passage on the highway.

Public passage is the primary and dominant use of the highway, whether for travel or transportation, on foot or horseback, by vehicle or by rail.⁶² To this supreme use of the highway all other public uses are subordinate, even telegraphs and telephones.⁶³ Priority of right or occupation of a street or

⁵⁸ *City of St. Louis v. Telephone Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. But see *State v. Telephone Co.*, 14 Ohio Cir. Ct. R. 273, 7 O. C. D. 536.

⁵⁹ *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *Levis v. Newton*, 75 Fed. 884; *Horner v. Eaton Rapids*, 122 Mich. 117, 80 N. W. 1012.

⁶⁰ *Commonwealth v. Warwick*, 185 Pa. 623, 40 Atl. 93; *Stone v. Mississippi*, 101 U. S. 817, 25 L. Ed. 1079.

⁶¹ *Michigan Telephone Co. v. Charlotte*, 93 Fed. 11.

⁶² *St. Louis & S. F. R. Co. v. Telegraph Co.*, 121 Fed. 276, 58 C. C. A. 198; *Cleveland, C., C. & St. L. Ry. Co. v. Cable Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941; *Cumberland Telephone & Telegraph Co. v. Railroad Co.*, 42 Fed. 273, 12 L. R. A. 544; *HUDSON RIVER TEL. CO. v. RAILWAY CO.*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; *Cincinnati Inclined Plane Ry. Co. v. Association*, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. Rep. 559.

⁶³ *Cumberland Telephone & Telephone Co. v. Railway Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; *Donovan v. Allert*, 11 N. D. 239,

road by them will not give them superiority.⁶⁴ No electric company for any purpose can claim a monopoly in the public highway, which is for all proper public uses. Electric companies may not, therefore, exercise their powers ruthlessly, but must act reasonably with due regard to the inferior rights of other companies;⁶⁵ and all of them in the construction, maintenance, and operation of their lines are subject to the police power of the sovereign to be exercised for the public welfare or safety.⁶⁶

Complex Character.

Electric companies are subject to many conditions, political and contractual, in the exercise of their rights, and dependent upon many public sources for their franchises and privileges. The state creates them and gives them the power of eminent domain. The federal government confers upon telegraph companies the franchise of the Post Roads. The municipality determines the conditions upon which telephone companies especially may construct, maintain, and operate their lines; and, after providing for all these things by contract, still possesses power to change these terms and conditions when demanded by the public welfare or safety.⁶⁷

Illustrations.

Conflict between these companies and the public and with other companies has been prolific of litigation, and the many

91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720; Cincinnati Inclined Plane Ry. Co. v. Association, *supra*.

⁶⁴ East Tennessee Telephone Co. v. Railroad Co. (Tenn.) 3 Am. El. Cas. 400.

⁶⁵ Western Union Telegraph Co. v. Electric Co., 76 Fed. 178; Cumberland Telegraph & Telephone Co. v. Railway Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; HUDSON RIVER TELEPHONE CO. v. RAILWAY CO., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838.

⁶⁶ People v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

⁶⁷ Ante, note 54.

decisions rendered have been for the most part in conformity with the doctrines above stated. Among other things, it has been ruled that an electric company is a trespasser against an abutting owner when it constructs a line on a street not designated;⁶⁸ when it enters private property, and cuts or trims trees thereon;⁶⁹ that a municipality may grant to one company the right to use the poles of another company;⁷⁰ that the license granted by a municipality is always with an implied reservation of power to require such changes by the company as will render the streets safer and more convenient for the public;⁷¹ that a company may be confined to one side of the street;⁷² and that they may cut or trim trees on or over the street so much as may be necessary for the proper construction and operation of their line.⁷³

⁶⁸ *Canastota Knife Co. v. Tramway Co.*, 69 Conn. 146, 36 Atl. 1107.

⁶⁹ *Southwestern Telegraph & Telephone Co. v. Branham* (Tex.) 74 S. W. 949; *Erie Telegraph & Telephone Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704; *Van Siclen v. Electric Light Co.*, 168 N. Y. 650, 61 N. E. 1135; *Metropolitan Trust Co. v. Power Co.*, 35 Misc. Rep. 467, 71 N. Y. Supp. 1055; *Memphis Bell Telephone Co. v. Hunt*, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237.

⁷⁰ *Bergin v. Telephone Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; *Citizens' Electric Light & Power Co. v. Sands*, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411.

⁷¹ *Commonwealth v. Warwick*, 185 Pa. 623, 40 Atl. 93.

⁷² *Consolidated Electric Light Co. v. Gas Co.*, 94 Ala. 372, 10 South. 440.

⁷³ *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Clay v. Cable Co.*, 70 Miss. 406, 11 South. 658; *Bradley v. Telephone Co.*, 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; *Southern Bell Telephone & Telegraph Co. v. Constantine*, 61 Fed. 61, 9 C. C. A. 359. But see *Bronson v. Tel. Co.* (Neb.) 93 N. W. 201, 60 L. R. A. 426.

ELECTRIC LIGHT COMPANIES.

206. Companies chartered to supply electric light and power to urban communities are quasi public corporations, subject to public regulation, as employing dangerous energy in furnishing public utilities, and enjoying the power of eminent domain.

The lighting of streets of a city has been held to be a proper municipal duty;⁷⁴ and the lighting of suburban highways has been declared to be a public function.⁷⁵ So, also, the furnishing of light to the citizens of an urban community.⁷⁶ But all these things are public uses; and electric corporations organized for the purpose of supplying light to a municipality, its citizens, or suburbs, are quasi public corporations,⁷⁷ and subject to public regulation. On the contrary, a municipal corporation which maintains and operates an electric plant to supply light for its streets and citizens is a quasi private corporation.⁷⁸

The use as well as the purpose of electric light companies is similar to that of gaslight companies, and in most particulars the same rules of law are applicable.

New Servitude.

Whether the erection of poles and the stringing of wires by electric light companies constitutes an additional burden upon abutting owners is not agreed upon by the courts. The tendency of the cases is, however, towards the doctrine that

⁷⁴ *Levis v. Newton*, 75 Fed. 884; *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Harlem Gaslight Co. v. New York*, 33 N. Y. 327.

⁷⁵ *Palmer v. Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.

⁷⁶ *Levis v. Newton*, 75 Fed. 884.

⁷⁷ *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 34 S. W. 51, 34 L. R. A. 369, 56 Am. St. Rep. 515; *Levis v. Newton*, *supra*.

⁷⁸ *BAILEY v. NEW YORK*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Bullmaster v. St. Joseph*, 70 Mo. App. 60; *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 26 N. E. 97, 10 L. R. A. 122.

an additional servitude is imposed on rural highways, but not on suburban streets;⁷⁹ except when the abutter's easement of access is materially impaired;⁸⁰ or when the business of the company is confined to the lighting of private houses and buildings.⁸¹ It has also been held that electric light companies hold inferior privileges and rights to street railway and telephone companies, and must therefore exercise them in such way as not to interfere with the superior rights of such companies;⁸² and in cases of contest between two electric light companies in the same city superior right has been adjudged in favor of the first occupant where it has equal franchises;⁸³ and against the first occupant where the newcomer has a contract with the city for lighting the streets.⁸⁴

Discrimination Unlawful.

Because of the public nature of these utilities, it is well settled that an electric light company cannot discriminate between citizens in the matter of light or accommodation,⁸⁵ but must furnish all applicants with equal privileges at the same rates, and at reasonable prices.⁸⁶

⁷⁹ *Tiffany v. Illuminating Co.*, 67 How. Prac. (N. Y.) 73; *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Palmer v. Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; *Haverford El. Light Co. v. Hart* (Pa.) 4 Am. El. Cas. 148.

⁸⁰ *Tiffany v. Illuminating Co.*, *supra*.

⁸¹ *Johnson v. Electric Co.*, 54 Hun, 469, 7 N. Y. Supp. 716; *Callen v. Electric Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782.

⁸² *Paris Electric Light & Ry. Co. v. Telephone Co.* (Tex.) 27 S. W. 902.

⁸³ *Consolidated Electric Light Co. v. Gas Co.*, 94 Ala. 372, 10 South. 440.

⁸⁴ *Terre Haute Electric Light & Power Co. v. Power Co.* (Ind.) 6 Am. El. Cas. 193.

⁸⁵ *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Jones v. Electric Co.*, 158 N. Y. 678, 52 N. E. 1124.

⁸⁶ *Cincinnati, H. & D. R. Co. v. Bowling Green*, *supra*; *Gould v. Illuminating Co.*, 29 Misc. Rep. 241, 60 N. Y. Supp. 539.

CHAPTER XXIII.**WATER AND GAS COMPANIES.**

- 207. Quasi Public Character.
- 208. Franchise Obtained Where.
- 209. Subject to Municipal Police Regulations.
- 210. Regulation of Prices by Municipality—Limitations.
- 211. Reasonable Regulation of Rates—Basis of.
- 212. Judicial Investigation.
- 213. Reasonable Regulations Prescribed by Companies.
- 214. Municipal Ownership and Operation—Liability.

QUASI PUBLIC CHARACTER.

- 207. Companies chartered and operated to supply water or gas for the use of urban communities perform an important public function, and are quasi public corporations.**

The supreme function of government is the preservation of public order. The sovereign faculty by which this is effected is the police power. Its chief office is the prevention and suppression of crime, which loves the darkness. The most constant and persistent of police agencies is light. The artificial lighting of the streets of a city is therefore a public use of transcendent value to society. For nearly a century this has been accomplished by the use of gas; and authority to erect gasworks to light the streets and supply the citizens with gas for illumination is usually found in the municipal charters of the United States. This agency has in recent years been in large measure superseded by electricity; but gas companies still continue to supply gas for light to the citizens of many urban communities, and are recognized as quasi public corporations,¹ and property may be taken by condemnation proceed-

¹ *Owensboro Gaslight Co. v. Hildebrand* (Ky.) 42 S. W. 351; *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. 935; *Bloomfield & R. Natural Ing. Corp.*—38

ings under the power of eminent domain for the necessary uses of gas companies.²

Water Companies.

Water is the oldest of all the recognized public utilities. It was regarded as a matter of prime necessity in the ancient cities of the Orient, and before the Christian Era the aqueducts of Rome, whereby the citizens of the Eternal City were supplied with an abundance of pure water, aggregated more than 350 miles in length. The larger cities of America control their own water supply through a branch of the municipal government; but a majority of the lesser municipalities of the United States are supplied with water by private companies under contract with the municipalities. These companies are generally regarded of such high public use as to be invested by the state with the sovereign power of eminent domain, whereby they may condemn lands, springs, and water courses for the public use;³ and claims of abutting owners on streets for additional burdens from their pipes and mains have generally

Gas Co. v. Richardson, 63 Barb. (N. Y.) 437; *Lewis*, Em. Dom. § 173.

² *City of Rushville v. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Harlem Gaslight Co. v. Mayor*, 33 N. Y. 327; *City of Indianapolis v. Coke Co.*, 66 Ind. 396; *Bloomfield & R. Natural Gas Co. v. Richardson*, *supra*; *Kincaid v. Gas Co.*, 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. Rep. 113; *Commonwealth v. Gaslight Co.*, 12 Allen (Mass.) 75; *Brunswick Gas Light Co. v. Gas Light Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621.

³ *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856. A public use of water must be for the general public, or some portion of it, and not a use by or for particular individuals or societies. *Hildreth v. Water Co.*, 139 Cal. 22, 72 Pac. 395; *Spring Valley Water Works v. Water Works*, 64 Cal. 123, 28 Pac. 447; *City of Rome v. Cabot*, 28 Ga. 50; *Hale v. Houghton*, 8 Mich. 458; *MINERS' DITCH CO. v. ZELLERBACH*, 37 Cal. 543, 99 Am. Dec. 300; *City of New York v. Bailey*, 2 Denio (N. Y.) 433; *Tyler v. Hudson*, 147 Mass. 609, 18 N. E. 582.

been disallowed by the courts.⁴ Municipalities also, as we have seen,⁵ for the purpose of obtaining water supply, have been given this power beyond municipal boundaries. Water companies, therefore, are recognized in law as quasi public corporations.⁶

FRANCHISE OBTAINED WHERE.

208. Gas and water companies, like electric companies, obtain their franchises from the state, but subject to municipal license.

Gas and water companies, like all other private corporations, obtain their powers through legislative grant, either by special act or under general statutes. The extent of their franchises therefore depends upon the proper construction of the statute conferring the powers. In some instances they have been clothed not only with the ordinary powers of a private cor-

⁴ *Crooke v. Water Works Co.*, 29 Hun (N. Y.) 245; *West v. Bancroft*, 32 Vt. 371; *City of Boston v. Richardson*, 13 Allen (Mass.) 146; *Lewis, Em. Dom.* §§ 128, 129.

⁵ *Ante*, § 117; *Hepburn v. Jersey City*, 67 N. J. Law, 686, 52 Atl. 1132; *West Boylston Mfg. Co. v. Water Board*, 183 Mass. 267, 67 N. E. 241.

⁶ *City of Tampa v. Waterworks Co.* (Fla.) 34 South. 631; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *Bloomfield & R. Natural Gas Co. v. Richardson*, 63 Barb. (N. Y.) 437.

A water company organized by statute is a quasi public corporation entitled to charge reasonable rates for its services, and no more. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

The fact that water companies are called private corporations does not exempt them from legislative or municipal control. *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232, 59 C. C. A. 236; *City Water Co. v. State* (Tex.) 33 S. W. 259; *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; *CRUMLEY v. WATER CO.*, 99 Tenn. 420, 41 S. W. 1058; *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487.

poration, and also the power of eminent domain to take private property on just compensation; but water companies have been held to have the power of appropriating even streets and public parks for reservoir purposes under legislative grant.⁷

Legislative Power Absolute.

The legislature, in the exercise of its plenary power, may confer these rights absolutely upon such corporations, so that they may build and operate their plants without municipal consent.⁸ But because of the superior knowledge possessed by local governments as to the wants of the community and the necessary details of supplying them, this absolute power is rarely exercised; and gas and water companies, like electric companies, are usually required to obtain municipal license to build and operate within municipal boundaries.⁹

Enumeration of Powers.

The powers usually conferred upon gas and water companies in order that they may efficiently carry out the objects of their incorporation, are to introduce water or gas into any town, city, or village named in their articles of incorporation, and where their corporation is located; and to lay pipes in and through the streets, avenues, lanes, alleys, or squares thereof; and enter on any lands, as far as need be, for these purposes and for the

⁷ *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; *West v. Bancroft*, 32 Vt. 367; *Webb v. Mayor*, 64 How. Prac. (N. Y.) 10. But see *City of Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77.

⁸ *Lawrence v. Hennessy*, 165 Mo. 659, 65 S. W. 717; *David v. Committee*, 14 Or. 98, 12 Pac. 174; *HOPE v. DEADERICK*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *NICHOL v. NASHVILLE*, 9 Humph. (Tenn.) 252; *Beers v. Arkansas*, 20 How. (U. S.) 527, 15 L. Ed. 991; *MUNN v. PEOPLE*, 69 Ill. 80; *Same v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Calder v. Bull*, 3 Dall. (U. S.) 386, 1 L. Ed. 648; *Benson v. New York*, 10 Barb. (N. Y.) 223; *Town of Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121.

⁹ *Borough of Madison v. Gaslight Co. (N. J.)* 54 Atl. 439; 2 Dill Mun. Corp. §§ 597, 657, 691, 698.

erection of the necessary plant; and to lay or construct any pipes, conduits, reservoirs, or other works or machinery necessary or proper and authorized for such purposes upon any lands or property entered upon, purchased, taken, or held. They may also enter on any lands, streets, highways, lanes, alleys, and public squares through which they may deem it proper to carry their utility, and there lay pipes, etc., leaving the premises as nearly as may be in the same condition as before.¹⁰

SUBJECT TO MUNICIPAL POLICE REGULATIONS.

209. The municipality generally grants its license to build and operate by contract with the company; but this right is exercised subject to the police power of the municipality to regulate and control operations.

The details of construction and operation of gas and water plants are commonly fixed by contract between the municipality and the company, wherein is conceded to the company the right to lay its pipes and mains along the streets of the city, and supply gas or water for public or private uses within its boundaries. Sometimes this contract assumes to give to the company this right exclusive of all other companies. In some cases such a contract has been held void as constituting an unlawful monopoly;¹¹ but the Supreme Court of the United States in leading cases¹² has held such a contract between the municipality and the company to be valid, and within the protection of the contract clause of the federal Constitution. In such cases, of course, a subsequent concession to another company of a like right to build and operate within the mu-

¹⁰ See, for example, How. Ann. St. Mich. § 3115.

¹¹ *CITY OF BRENHAM v. WATER CO.*, 67 Tex. 542, 4 S. W. 143; *Norwich Gaslight Co. v. Gas Co.*, 25 Conn. 19. Cf. *Citizens' Water Co. v. Hydraulic Co.*, 55 Conn. 1, 10 Atl. 170. Contra, *Hurley Water Co. v. Vaughn*, 115 Wis. 470, 91 N. W. 971.

¹² *NEW ORLEANS GASLIGHT CO. v. MANUFACTURING CO.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525

municipal limits would be void;¹³ but, since the municipality cannot barter away the sovereign duty and police power conferred upon it, the operations of the company under such contract are always subject to reasonable regulation by subsequent as well as antecedent municipal ordinances.¹⁴

Monopolistic Intent and Authority Must Appear.

No presumption will be indulged by courts in favor of a claim for a monopoly.¹⁵ Both the intention and the authority of the municipality to make a contract conceding the exclusive right to furnish gas to the citizens must plainly appear, or the claim will be denied.¹⁶ A contract giving a company the right to lay its mains in the streets and supply the citizens with gas or water for twenty years will not prevent the municipality from making a like concession to another water, gas, or electric light company, or constructing its own plant.¹⁷ It has

¹³ So held in gas case in last note, and in water case concession of right by city to private person to supply himself was declared void.

¹⁴ *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232, 59 C. C. A. 236; *NEW ORLEANS GASLIGHT CO. v. MANUFACTURING CO.*, supra; *National Water Works Co. v. Kansas City*, 28 Fed. 921; *Stein v. Water Supply Co.*, 34 Fed. 145.

An act providing that a consumer shall be supplied with a gas meter supplied by the gas company without charge, to be inspected by officials designated for that purpose, is a valid police regulation. *Buffalo v. Buffalo Gas Co.*, 81 App. Div. 505, 80 N. Y. Supp. 1093.

¹⁵ *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *State v. Coke Co.*, 18 Ohio St. 262; *City of Indianapolis v. Coke Co.*, 66 Ind. 396.

¹⁶ *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250, 80 N. W. 746; *People v. Bowen*, 30 Barb. (N. Y.) 24; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *City of Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Tuckahoe Canal Co. v. Railroad Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Lehigh Valley R. Co. v. Newark*, 44 N. J. Law, 323.

¹⁷ *City of Helena v. Waterworks Co.*, 122 Fed. 1, 58 C. C. A. 381; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650;

been held that water and gas companies may be compelled by the municipality to lower their pipes so as to adapt them to a change of street grade;¹⁸ and to make such other changes in location as public convenience or safety require.¹⁹ Such corporations, being chartered to supply public utilities, and possessing public powers, may be required by municipal ordinance to supply every building on the streets on which their mains are laid, upon compliance by the applicant with the reasonable regulations of the company.²⁰ And since every quasi public corporation must serve the public without discrimination, any private citizen would probably have this right, in the absence of any statute or ordinance requiring the services, though the right was denied in New Jersey in an old case.²¹

Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354, 22 Sup. Ct. 400, 48 L. Ed. 585; *Joplin v. Light Co.*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127.

¹⁸ Ante, § 111; also *City of Quincy v. Bull*, 106 Ill. 337.

¹⁹ *In re Deering*, 93 N. Y. 361; *National Water Works Co. v. Kansas City*, 28 Fed. 921; *Kiskiminetas Tp. v. Gas Co.*, 14 Pa. Super. Ct. 67.

²⁰ *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *City of Mobile v. Supply Co.*, 130 Ala. 379, 30 South. 445; *People v. Gaslight Co.*, 45 Barb. (N. Y.) 136; *New Orleans Gaslight & Banking Co. v. Paulding*, 12 Rob. (La.) 378; *Lloyd v. Gas Light Co.*, 1 Mackey (D. C.) 331; *Shepard v. Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264; *Williams v. Gas Co.*, 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266.

But where a city determined that public welfare was subserved by removing water mains and fire hydrants from a place where there was no demand for fire protection, and but one consumer, he was held not entitled to an injunction to restrain the removal, even though his property was thereby rendered valueless. *Asher v. Power Co.*, 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

²¹ *Paterson Gaslight Co. v. Brady*, 27 N. J. Law, 245, 72 Am. Dec. 360. See, also, cases in note 20.

REGULATION OF PRICES BY MUNICIPALITY—LIMITATIONS.

210. Unless estopped by valid contract or prevented by statute, a municipality may, in the appropriate exercise of its powers, regulate rates and prices to consumers of gas and water by reasonable ordinances.

The municipality is always the largest customer of the company for light and water, and by contract may make promises to pay prices, to which it will be bound as would any contracting party for any other article of commerce;²² and prices for private consumers may be thus fixed by municipal contract, so that they cannot be changed by ordinance;²³ but authority for the municipality to make such contracts must plainly appear.²⁴ A maximum rate may be fixed by company charter or by statute.²⁵ In the absence of such restriction, however, it is competent for the municipality to fix prices to be charged by the company supplying light or water,²⁶ such regulation

²² *Selbrecht v. New Orleans*, 12 La. Ann. 496; *CITY OF INDIANAPOLIS v. COKE CO.*, 66 Ind. 396; *CITY OF VALPARAISO v. GARDNER*, 97 Ind. 1, 49 Am. Rep. 416; *Douglass v. Virginia City*, 5 Nev. 147.

²³ *City of Tampa v. Waterworks Co. (Fla.)* 34 South. 631; *Logan Nat. Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186, 62 N. E. 122; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185. See, also, cases in preceding note.

²⁴ 1 Dill. Mun. Corp. § 447; *People v. Barnard*, 110 N. Y. 552, 18 N. E. 354; *Allegheny City v. Railway Co.*, 159 Pa. 411, 28 Atl. 202; *State v. Coke Co.*, 18 Ohio St. 262.

²⁵ *Muncie Nat. Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *CITY OF KNOXVILLE v. WATER CO.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720; *City of Danville v. Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304; *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739; *San Diego Land & Town Co. v. National City*, 74 Fed. 79.

²⁶ *State v. Coke Co.*, 18 Ohio St. 262; *State v. Gaslight Co.*, 29 Wis. 454, 9 Am. Rep. 598; *State v. Gas Co.*, 37 Ohio St. 45.

being a proper exercise of the police power. But the rate so fixed must not be less than the necessary cost of producing and supplying the utility, and thereby amount to a confiscation of the company's franchise.²⁷ Nor, indeed, must it be so low as to deprive the company of the just compensation which it is entitled to demand for its service.²⁸ The settled rule upon this subject is that the regulation of rates must be reasonable,²⁹ having in view both the rights of the company and those of its customers; for confiscation and extortion are equally odious to the law.³⁰

REASONABLE REGULATION OF RATES—BASIS OF.

211. A reasonable regulation of rates is one based upon the reasonable value of the company's property at the time it is being used for the public and the regulation enforced.

The power of public regulation of public utilities has been the subject of much contention during the last quarter of a century. The doctrine was first conspicuously asserted and applied in the celebrated Warehouse Case, in 1877, by the Supreme Court of the United States.³¹ This case and the Granger Cases³² seemed to concede absolute power of regulation to the legislature. Later cases, however, by the same

²⁷ *State v. Coke Co.*, supra; *Cotting v. Stock Yards Co.*, 183 U. S. 79, 91, 22 Sup. Ct. 30, 46 L. Ed. 92.

²⁸ *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, 23 Sup. Ct. 571, 47 L. Ed. 892.

²⁹ *People v. Gaslight Co.*, 45 Barb. (N. Y.) 136; *Tacoma Hotel Co. v. Water Co.*, 3 Wash. St. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 29 L. Ed. 636; *SMYTH v. AMES*, 169 U. S. 466, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY*, 174 U. S. 739-757, 758, 19 Sup. Ct. 804, 43 L. Ed. 1154.

³⁰ *CHICAGO, M. & ST. P. R. CO. v. MINNESOTA*, 134 U. S. 459, 10 Sup. Ct. 462, 33 L. Ed. 970.

³¹ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77.

³² *CHICAGO, B. & Q. R. Co. v. IOWA*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Railroad Co.*, 94 U. S. 164, 24 L. Ed. 97.

tribunal, have qualified this doctrine by declaring that statutes fixing rates amounting to confiscation were void.³³ Accordingly it was held in subsequent cases that such regulation, whether by the state or municipalities, must be reasonable,³⁴ and not such as would deprive the companies of fair compensation for services rendered.³⁵ Under this modified doctrine the courts necessarily assume the duty of saying whether a legislative act is a reasonable regulation.³⁶ This the courts determine upon the facts appearing in each case.³⁷ The determination of the legislature is presumed to be just; but, if the enforcement of the law will deprive the company of reasonable compensation, then it is being deprived of its property without due process of law.³⁸

³³ CHICAGO, M. & ST. P. R. CO. v. MINNESOTA, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970; SMYTH v. AMES, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

³⁴ SMYTH v. AMES, *supra*.

³⁵ City of Wilkes Barre v. Supply Co., 4 Lack. Leg. N. (Pa.) 367; Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal. 312, 53 Pac. 791; Turner v. Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432; Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; CHICAGO, M. & ST. P. R. CO. v. MINNESOTA, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970.

In a proceeding to determine the reasonableness of rates charged by a water company, the basis of calculation as to the value of the plant is the money actually invested; and if the rates charged yield any greater income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a reasonable sinking fund for the payment of debts, and pay a fair dividend to shareholders, they cannot be said to be unreasonable, and will be sustained by the court. City of Wilkes Barre v. Supply Co., *supra*.

³⁶ People's Gaslight & Coke Co. v. Hale, 94 Ill. App. 406; Brymer v. Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260. Also, as to reasonableness of a municipal ordinance fixing rates, Capital City Gas Co. v. Des Moines, 72 Fed. 818; SMYTH v. AMES, *supra*.

³⁷ Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 90 N. W. 746; SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

³⁸ Const. U. S. Fifth Amend.

The courts will not interfere to prevent the enforcement of an

Present Value.

Speaking of the decisions of the Supreme Court of the United States, Brewer, J., says: "It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined."³⁹ The language of Mr. Justice Holmes in a recent case is: "What the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public."⁴⁰ Municipal ordinances have long been subjected by the courts to the test of reasonableness, and the rules above mentioned are applied to municipal ordinances regulating rates for public utilities.⁴¹

JUDICIAL INVESTIGATION.**212. This reasonable value is matter for judicial decision upon due consideration of the various elements constituting such value.**

What these elements are and what methods shall be used in deciding what is reasonable value has given the courts no little trouble. Matters which have been suggested as proper for consideration are the cost of the plant, original and added;

ordinance fixing rates which may be charged by a water company, unless it is clear beyond a doubt that the rates fixed by the ordinance are so low that the enforcement will amount to a taking of property without just compensation. *Cedar Rapids Water Co. v. Cedar Rapids*, *supra*.

³⁹ *Cotting v. Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

⁴⁰ *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, 23 Sup. Ct. 571, 47 L. Ed. 892.

The basis of calculations as to the reasonableness of rates to be charged by a water company is the fair value of the property used by it for the convenience of the public, which has the right to demand that the rates shall be no higher than the services are worth to them as individuals. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

⁴¹ *Ante*, § 75.

the operating expenses; the revenue under the proposed rates of regulation; present cost of construction; amount and value of stock and bonds.⁴² In a very recent case⁴³ the Supreme Court of California says: "In determining such values, three, and, we believe, only three, methods are possible: (1) Either by ascertaining what the property could be sold for (its market value); (2) by ascertaining what it would cost to replace it; or (3) by ascertaining the revenue it is capable of producing." The first method would require for application either a public sale or the mere opinion of witnesses, and seems, therefore, not feasible for the practical purposes of litigation. Particular gas plants or water plants can hardly be said to have a market value, and courts cannot resort to an experiment of public sale merely to ascertain their value. The revenue basis seems fair and feasible. The quantity of water or gas furnished monthly or yearly can be determined from the company's books with reasonable certainty, as also its operating expenses, including annual repairs; and from these elements, with others attainable, reasonable value could be closely approximated by computation; though there still remains the difficulty of determining what the plant ought to yield to its owner. The replacement basis also seems practical, since the present cost of work and material and the amount thereof could be fairly approximated by competent engineers. The two most recent cases, however—*Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.*⁴⁴ and *Spring Valley Waterworks v. San Francisco*⁴⁵—leave the problem still unsettled, and the rules for settling it unwritten.

⁴² *Logansport & W. Valley Gas Co. v. Peru*, 89 Fed. 185; *SMYTH v. AMES*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. Ed. 819.

⁴³ *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 637, 38 L. R. A. 460, 62 Am. St. Rep. 261.

⁴⁴ 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406.

⁴⁵ 124 Fed. 574.

REASONABLE REGULATIONS PRESCRIBED BY COMPANIES.

213. Gas and water companies may prescribe and enforce reasonable rules to regulate their course of dealing with and service to their customers; but unreasonable regulations are void.

Every private person or corporation may choose with whom he or it will deal. They are not bound to sell to any one at any price; and with their customers they may deal as they will, selling to one at one price and to another at a higher or lower price, giving credit to one and requiring cash from another. But a quasi public corporation has no such liberty of choice and freedom of trade. It must deal with all who come within its scope upon equal terms, and without discrimination.⁴⁶ To protect itself against the fraud, default, or negligence of vicious, indigent, or careless customers, and to insure promptness and regularity in the transaction of business, a quasi public corporation may make and enforce reasonable rules and reg-

⁴⁶ State v. Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; State v. Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. Rep. 574; Haugen v. Water Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Indiana Natural Illuminating Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; LOWELL v. BOSTON, 111 Mass. 464, 15 Am. Rep. 39; NEW ORLEANS GAS-LIGHT CO. v. HEAT CO., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Williams v. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; City of Macon v. Harris, 73 Ga. 428; Smith v. Telegraph Co., 42 Hun (N. Y.) 454.

A natural gas company, given the power by a city to locate its pipes for the purpose of supplying the city with natural gas, is bound to furnish gas to every inhabitant of the city who complies with the regulations prescribed by the city ordinances or fixed by the contract between the council and the company. Charleston Nat. Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410.

ulations,⁴⁷ which, when made known to its customers, are contractual and controlling in their character.⁴⁸

Manner of Notice, and Effect.

These rules are generally furnished to their customers by gas and water companies in the form of little pamphlets, and the more important ones are usually printed upon the receipts for monthly or quarterly bills. The consumer is presumed thereby to be notified of the tenor and effect of these rules and regulations, and by continuing his dealing with the company to give his assent thereto.⁴⁹ But his assent is not necessary, since the company is clothed with power to make and enforce all reasonable regulations for its own convenience and security.⁵⁰ But these rules are always subject to challenge before the court, and, if found by them to be unreasonable, are declared void for that cause.⁵¹ Any attempt or threat to enforce such unreasonable regulations may be enjoined in chancery,⁵² and an action will lie against the company for injury sustained by any customer through their arbitrary enforcement.⁵³

⁴⁷ *Metropolitan Grain & Stock Exch. v. Board of Trade*, 15 Fed. 850; *Missouri v. Telephone Co.*, 23 Fed. 539; *CRUMLEY v. WATER CO.*, 99 Tenn. 420, 41 S. W. 1058; *Tacoma Hotel Co. v. Water Co.*, 3 Wash. St. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35; *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320.

⁴⁸ *Hieronimus v. Supply Co.*, 131 Ala. 447, 31 South. 31; *Shepard v. Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479.

⁴⁹ *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149.

⁵⁰ *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841; *Harbison v. Water Co. (Tenn.)* 53 S. W. 993.

⁵¹ *Red Star Line S. S. Co. v. Jersey City*, 45 N. J. Law, 246.

⁵² *Edwards v. Water Co.*, 116 Ga. 201, 42 S. E. 417; *Graves v. Gas Co.*, 93 Iowa, 470, 61 N. W. 937; *Dayton v. Quigley*, 29 N. J. Eq. 77; *Williams v. Gas Co.*, 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266.

⁵³ *Coy v. Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *CRUMLEY v. WATER CO.*, 99 Tenn. 420, 41 S. W. 1058; *Shepard v. Gaslight Co.*, 15 Wis. 318, 82 Am. Dec. 679.

What are Reasonable or Unreasonable.

Rules have been held to be reasonable and proper which authorized the company to disconnect its pipes from those of a consumer who does not pay his bill to the company within a fixed time after rendered;⁵⁴ or from a water consumer without meter who wastes water by allowing it to run continually;⁵⁵ or from one who permits his neighbors to use water from his hydrant, or sells water therefrom;⁵⁶ or refuses to give security or make deposit to insure payment of rates.⁵⁷

On the contrary, regulations have been held to be unreasonable and void which, on penalty to disconnect, required consumers to buy an expensive meter of a particular kind;⁵⁸ or to permit an inspector to have free access at all times to buildings and dwellings, and to remove meter and service pipe.⁵⁹

⁵⁴ *People v. Gaslight Co.*, 45 Barb. (N. Y.) 136; *Tacoma Hotel Co. v. Water Co.*, 3 Wash. St. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35; *Fuller v. Irrigating Co.*, 138 Cal. 204, 71 Pac. 98; *Harbison v. Water Co. (Tenn.)* 53 S. W. 993; *Sheward v. Water Co.*, 90 Cal. 635, 27 Pac. 439; *American Waterworks Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610; *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320.

Rules for payment for water in advance have been held reasonable. *Harbison v. Water Co.*, supra; *City of Rushville v. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Rockland Water Co. v. Adams*, 84 Me. 472, 24 Atl. 840, 30 Am. St. Rep. 368.

⁵⁵ *State v. Water Co.*, 18 Mont. 199, 44 Pac. 966, 82 L. R. A. 697, 56 Am. St. Rep. 574; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841.

⁵⁶ *McDaniel v. Waterworks Co.*, 48 Mo. App. 278.

⁵⁷ *Shepard v. Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479.

⁵⁸ *Red Star Line S. S. Co. v. Jersey City*, 45 N. J. Law, 246.

⁵⁹ *Shepard v. Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479.

MUNICIPAL OWNERSHIP AND OPERATION—LIABILITY.

§14. A municipality which owns and operates gas or water works or supplies other public utilities to its citizens thereby abdicates the sovereign status of exemption from suit, and becomes liable just as a quasi public corporation for injuries sustained by customers from tort or breach of contract in its operations.

Many cities own waterworks, and some gasworks and electric light plants, with which to supply citizens with water and light; and the public ownership of street railways—not uncommon in Europe—is being ably urged and advocated in America. Whenever a municipality engages in the business of supplying its citizens with any of these public utilities, which are usually furnished by quasi public corporations, it then becomes quoad hoc a business corporation,⁶⁰ and in its dealings with customers purchasing these public utilities surrenders its vantage ground as a governmental agency. In all its transactions with citizens as such business corporation it is subject to the same doctrines of the law as quasi public corporations,⁶¹ although a legal antipode; the quasi public corporation being a private corporation enjoying and exercising a public use, and the municipal corporation a public corporation transacting business for profit. In its exercise of this private function it may therefore be not inappropriately called quo ad hoc a quasi private corporation.

⁶⁰ *Baily v. Philadelphia*, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837, 63 Am. St. Rep. 812; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

⁶¹ *BAILEY v. NEW YORK*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185; *THAYER v. BOSTON*, 19 Pick. (Mass.) 511, 31 Am. Dec. 157.

CHAPTER XXIV.

OTHER QUASI PUBLIC CORPORATIONS.

- 215. What Private Corporations are Quasi Public.
- 216. What Qualities Make Them Quasi Public Corporations.
- 217. Classes.

WHAT PRIVATE CORPORATIONS ARE QUASI PUBLIC.

215. The ultimate test for deciding whether a private corporation is quasi public is its subjectivity to special legislative control.

All private corporations are subject to the sovereign power of government, which must have control of all persons and property within its boundaries. Its very existence requires that it shall have and exercise the police power, the power of eminent domain, and the power of taxation. Private corporations, therefore, as well as private persons and public corporations, are all subject to the powers that be. But in the United States there are constitutional limitations upon the exercise of governmental powers; and private corporations have received special protection against the arbitrary exercise of power in the several states from the application of the contract clause of the federal Constitution¹ to their charters by the Supreme Court of the United States in the celebrated Dartmouth College Case.² Under that case the charter of every private corporation is a contract with the state granting it; and no state can pass any law impairing the obligation of that contract.³ The corporation may consent to a change of its

¹ Art. 1, § 10.

² DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

³ Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; Downing v. Board, 129 Ind. 443, 28 N. E. 123, 12 L. R. A. 664.

charter. The state may reserve the power of change in the charter itself, as is now usually done. But without one of these conditions the state does not possess the power of legislative control over a private corporation, except for police, eminent domain, and taxation.⁴ This limitation, however, applies only to strictly private corporations, whose sole uses, functions, and powers are private.

"Whenever the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good."⁵ This rule applies alike to natural persons and to private corporations; and this right of public control and regulation of the affairs of a private corporation is that which makes such private corporations to be quasi public,⁶ and without which it is a strictly private corporation, and subject to no special public control.

WHAT QUALITIES MAKE THEM QUASI PUBLIC CORPORATIONS.

216. The question whether a private corporation is subject to special public regulation and control, and is therefore a quasi public corporation, is to be decided by ascertaining whether

- (a) Its property is devoted to a public use; or**
- (b) Its franchises are of a public nature; or**
- (c) It must deal with all persons without arbitrary discrimination; or**
- (d) It has the power of eminent domain.**

Some quasi public corporations, such as railroads, are endowed with all the foregoing faculties, and therefore afford the best illustration of a quasi public corporation; but it is not

⁴ Clark, *Priv. Corp.* §§ 73, 74. *WEST RIVER BRIDGE CO. v. DIX*, 6 How. (U. S.) 507, 12 L. Ed. 535.

⁵ Waite, C. J., in *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77.

⁶ Ante, § 185.

essential to public control of a corporation that it shall possess all these qualities. The legislature, representing the sovereign power, may in its discretion confer all or a portion of them upon a corporation. If it be endowed with any one of these properties, it will be to that extent a quasi public corporation, and must submit to public regulation.⁷ To decide, therefore, whether any private corporation is quasi public, it is only necessary to ascertain whether it possesses any one of the foregoing faculties.

Public Use.

Corporations and persons whose property was devoted to a use in which the public was interested had early been treated as subject to public control.⁸ But this doctrine of the law had lain comparatively dormant until 1871, when the legislature of Illinois passed "An act to regulate public warehouses, and the warehousing and inspection of grain,"⁹ in which it fixed the rates to be charged for such service in that state. This act was challenged as unconstitutional, as impairing the obligation of the charter contract,¹⁰ as depriving warehouse companies of property without due process of law,¹¹ and as denying to them the equal protection of the law;¹² and hence arose the celebrated case of *Munn v. Illinois*,¹³ decided first by the Supreme Court of Illinois,¹⁴ and ultimately in the Supreme Court of the United States¹⁵ in 1876, in which, after much strenuous contention, the right of the state to regulate the business and prices of public warehousing was recognized and de-

⁷ *Trenton & N. B. Turnpike Co. v. News Co.*, 43 N. J. Law, 381; *CHICAGO, B. & Q. R. CO. v. IOWA*, 94 U. S. 155, 24 L. Ed. 94; *MUNN v. ILLINOIS*, *supra*.

⁸ Lord Hale in *De Portibus Moris*, 1 Harg. Law Tracts, 78.

⁹ Const. Ill. art. 13; Acts April 25, 1871.

¹⁰ Const. U. S. art. 1, § 10.

¹¹ *Id.* amend. 5.

¹² *Id.* amend. 14, § 1.

¹³ Commonly known as *The Warehouse Case*.

¹⁴ 69 Ill. 80.

¹⁵ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77.

clared upon the sole ground that such corporations by their charter and operation thereunder devoted their property to a use in which the public had an interest, and therefore to the extent of that interest the state had the power of regulating such property for the common good. That doctrine of the old common law thus revived and established has been since applied to many other classes of private corporations whose property has been devoted to public use upon the broad foundation laid in that decision; and any corporation now whose property is devoted to such public use is regarded as subject to reasonable regulation by the state.¹⁶

Public Franchises.

Some corporations owning very little property—so little, indeed, as not to form a distinguishing feature of corporate character—such as certain express or messenger companies, are treated as quasi public corporations from the nature of their charter powers, rather than the devotion of their property to public use. It is true that corporate franchises are in law corporate property,¹⁷ though not commonly so called. The corporate feature which gives character and value to the organization is its franchise, rather than its visible property. Corporations possessing franchises for the performance of public service must also submit to public control for the common good in the performance of that public service.¹⁸ Private

¹⁶ *Ernst v. Waterworks Co.*, 39 La. Ann. 550, 2 South. 415; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *State v. Water Co.*, 18 Mont. 199, 44 Pac. 366, 32 L. R. A. 697, 56 Am. St. Rep. 574; *Minneapolis & St. L. Ry. Co. v. Commission*, 44 Minn. 336, 46 N. W. 559; *State v. Railroad Co.*, 47 Ohio St. 130, 23 N. E. 928; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173.

¹⁷ *New York N. H. & H. R. Co. v. Traction Co.*, 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; *Fletsam v. Hay*, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 493; *Payne v. Goldbach*, 14 Ind. App. 100, 42 N. E. 642.

¹⁸ *California v. Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed.

corporations, therefore, which perform messenger or express service, or any other similar public function, by virtue of their franchises, are quasi public corporations because they enjoy and exercise under their charter such public franchises.¹⁹

No Discrimination.

It is an incident of public service, as we have seen,²⁰ that it must be rendered to all persons upon equal terms and without arbitrary discrimination, and this is the peculiar feature by which many quasi public corporations are distinguished and recognized. All railroads are not public highways. A private railroad may be constructed by a private person or a private corporation for strictly private use.²¹ A natural person or a private corporation may be a private carrier, and therefore not subject to the law of common carriers.²² Persons or corporations may own private hotels for the purpose of accommodating guests without being subject to the rules of law which govern public innkeepers whose houses are kept for the accommodation of the traveling public.²³ Chartered companies performing such private services are strictly private corporations; but corporations which are chartered for the purpose of performing the duties of common carriers or public entertainment, or which, under their charter franchises, hold themselves out

150; *LOUISVILLE, C. & C. R. CO. v. CHAPPELL*, Rice (S. C.) 383; *Detroit, Ft. W. & B. I. Ry. Co. v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860; *PENSACOLA TELEGRAPH CO. v. TELEGRAPH CO.*, 96 U. S. 1, 24 L. Ed. 708; *Henley v. State*, 98 Tenn. 665, 41 S. W. 352, 39 L. R. A. 126.

¹⁹ *United States Express Co. v. Backman*, 28 Ohio St. 144; *Bank of Kentucky v. Express Co.*, 93 U. S. 174, 23 L. Ed. 872.

²⁰ *Ante*, § 189.

²¹ *In re NIAGARA FALLS & W. RY. CO.*, 108 N. Y. 375, 15 N. E. 429; *In re Split Rock-Cable Road Co.*, 128 N. Y. 408, 28 N. E. 506.

²² *Bouv. Law. Dict. in verb.*

²³ *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218; *Johnson v. Finance Co.*, 89 Minn. 810, 94 N. W. 874; *Fay v. Pacific Imp. Co.*, 98 Cal. 253, 28 Pac. 943, 18 L. R. A. 188, 27 Am. St. Rep. 198.

to the public as carrying on such business, must serve the public without discrimination, and upon like terms and conditions to all applicants.²⁴ It may not be easy to determine upon construction of the charter whether the franchise is granted for public or private purposes. In case of doubt, notwithstanding the abstract rule of strict construction, corporations may be held to their own interpretation of their charter privileges; and if they assume to carry on their business for the public benefit they will be held to the performance of the duties which they have undertaken,²⁵ the standard of judgment in such case being the function performed by the corporation, rather than the strict letter of its charter. Corporations which are by the nature of their business bound to serve the public without discrimination are from that fact quasi public corporations, and therefore subject to public regulation.²⁶

Eminent Domain.

The possession of the sovereign power of eminent domain by a private corporation, whether it is exercised or not, is the surest test of its quasi public character.²⁷ The power of eminent domain, being a sovereign power, cannot be exercised for any private purpose.²⁸ The grant of that power to a

²⁴ *Manning v. Wells*, 9 *Humph.* (Tenn.) 747, 51 *Am. Dec.* 688; *Pinkerton v. Woodward*, 33 *Cal.* 557, 91 *Am. Dec.* 657; and cases in preceding note.

²⁵ *Whitney Arms Co. v. Barlow*, 63 *N. Y.* 62, 20 *Am. Rep.* 504; *Darst v. Gale*, 83 *Ill.* 136; *Day v. Spiral Springs Buggy Co.*, 57 *Mich.* 146, 23 *N. W.* 628, 58 *Am. Rep.* 352.

²⁶ *Friedman v. Telegraph Co.*, 32 *Hun* (N. Y.) 4; *American Rapid Tel. Co. v. Telephone Co.*, 49 *Conn.* 352, 44 *Am. Rep.* 237; *State v. Telephone Co.*, 17 *Neb.* 126, 22 *N. W.* 237, 52 *Am. Rep.* 404; *Georgia R. & Banking Co. v. Smith*, 128 *U. S.* 177, 9 *Sup. Ct.* 47, 32 *L. Ed.* 377.

²⁷ *State v. Railroad Co.*, 29 *Neb.* 550, 45 *N. W.* 785; *NEW YORK & H. R. CO. v. KIP*, 46 *N. Y.* 548, 7 *Am. Rep.* 385; *Brady v. State*, 26 *Md.* 290; *Oregonian R. Co. v. Hill*, 9 *Or.* 377; *Lewis, Em. Dom.* §§ 157, 162.

²⁸ *Beekman v. Railroad Co.*, 8 *Paige* (N. Y.) 45, 22 *Am. Dec.* 679; *Woodward v. Railway Co.*, 180 *Mass.* 599, 62 *N. E.* 1051; *Ma-*

corporation is an unequivocal legislative declaration that the corporation is not a purely private corporation. It must serve the public because it is granted the power of eminent domain.²⁹ Its duty is not dependent upon the exercise of that power. A railroad company may acquire by purchase all the land it needs. It is none the less a quasi public corporation.³⁰ And so all water, gas, and electric companies, and other private corporations possessing the charter franchise to exercise the power of eminent domain belong to the class of quasi public corporations.³¹

CLASSES.

217. Quasi public corporations, by their business, naturally arrange themselves in classes as follows:

- (a) Those improving highway facilities.
- (b) Those performing, generally or specially, the functions of common carriage.
- (c) Those serving the public as bailees.
- (d) Those enhancing real estate.

As heretofore shown,³² railroads, and particularly street railways, are improved public highways, and are therefore quasi

ginnis v. Ice Co., 112 Wis. 385, 88 N. W. 300; *Scudder v. Trenton*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Pittsburg, W. & K. R. Co. v. Iron works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

²⁹ *Kettle River R. Co. v. Railroad Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *In re NIAGARA FALLS & W. RY. CO.*, 108 N. Y. 385, 15 N. E. 429; *Central R. Co. v. Railroad Co.*, 31 N. J. Eq. 475; *Denver R. Co. v. Union Pac. Ry. Co. (C. C.)* 34 Fed. 386.

³⁰ *California v. Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784; *Bald. Am. R. R. Law*, pp. 448, 449.

³¹ *CITY OF KNOXVILLE v. WATER CO.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; *Id.*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *COY v. GAS CO.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *State v. Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *American Rapid Tel. Co. v. Telephone Co.*, 49 Conn. 352, 44 Am. Rep. 237.

³² *Ante*, § 131.

public corporations. No property is more exclusively and peculiarly devoted to the public uses than a highway; and so all private corporations having for their purpose the improved uses of a highway, or any portion of it, must necessarily be quasi public corporations. A bridge company is a quasi public corporation because it affords increased facilities for travel by spanning a stream.³³ So, likewise, is a canal company which digs and maintains a canal to be used by other persons or companies furnishing their own boats and power.³⁴ A ferry company performs the same service and function as a bridge company, and is for the same reason a quasi public corporation.³⁵ A turnpike company, as furnishing an improved highway for public use in the ordinary methods, is the oldest and best illustration of a quasi public corporation of this class.³⁶

Common Carriers.

Carriers are of two classes—private and public. The latter are usually called common carriers, and are the only ones subject to public regulation. Common carriers have also been divided into general and special. The latter confine themselves to the carriage of special classes of articles; as, for instance, express companies and telegraph companies. The former, like railroad companies or navigation companies, carry on a general business of carriage for the public. All public carrying companies, whether general or special, must serve the public with-

³³ *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453, 68 L. R. A. 301; *Arnold v. Bridge Co.*, 1 Duv. (Ky.) 372; *In re Towanda Bridge Co.*, 91 Pa. 216.

³⁴ *New York Cement Co. v. Cement Co.*, 37 Misc. Rep. 746, 76 N. Y. Supp. 469; *TEN EYCK v. CANAL CO.*, 18 N. J. Law, 200, 37 Am. Dec. 233; *Chesapeake & O. Canal Co. v. Key*, 3 Cranch, C. C. 599, Fed. Cas. No. 2,649.

³⁵ *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872; *Burlington & Henderson County Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390.

³⁶ *Knox County v. Kennedy*, 92 Tenn. 1, 20 S. W. 311; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *State v. New Brunswick*, 30 N. J. Law, 395; *Douglass v. President, etc.*, 22 Md. 219, 85 Am. Dec. 647; *State v. Maine*, 27 Conn. 641, 71 Am. Dec. 89.

out discrimination, and, if incorporated, are quasi public corporations.³⁷ To this class, in addition to those already treated, belong express companies of all kinds;³⁸ navigation companies,³⁹ whether operating on ocean, lake, river, or canal; and transportation companies generally.⁴⁰

Bailees.

Common carriers are bailees and insurers of all goods committed to their care, but are not included in the present class of bailees, which receive and hold in trust goods and chattels for other purposes than carriage. Bailees, like carriers, may be private or public. With the former we have nothing to do. Like other persons, they deal only with those whom they choose for their customers, and at prices with which the public has no concern. But corporations are chartered in divers states with franchises of public bailment for various purposes, which must deal with all applicants upon reasonable and equal terms, and are therefore quasi public corporations, and subject to public

³⁷ *Ohio Coal Co. v. Whitcomb*, 123 Fed. 359, 59 C. C. A. 487; *Memphis News Pub. Co. v. Railroad Co.*, 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150; *Youghiogheny & Ohio Coal Co. v. Railway Co.*, 24 Ohio Cir. Ct. R. 289; *Tift v. Railway Co.* (C. C.) 123 Fed. 789; *Cincinnati, H. & D. R. Co. v. Village of Bowling Green*, 57 Ohio St. 49, 49 N. E. 121, 41 L. R. A. 422; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Pinckney v. Telephone Co.*, 19 S. C. 71, 45 Am. Rep. 765.

³⁸ *Southern Exp. Co. v. Craft*, 49 Miss. 480, 19 Am. Rep. 4; *Same v. St. Louis, I. M. & So. Ry. Co.* (C. C.) 10 Fed. 210, 3 McCrary, 147; *Bank of Kentucky v. Express Co.*, 93 U. S. 174, 23 L. Ed. 872; *Zeigler v. Express Co.*, 23 Cal. 179, 83 Am. Dec. 87.

³⁹ *Klair v. Steamboat Co.* (Del.) 54 Atl. 694; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Lancaster v. Log Driving Co.*, 62 Me. 272; *Memphis & O. R. Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Gray's Ex'r v. Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Swarthout v. Steamboat Co.*, 48 N. Y. 209, 8 Am. Rep. 541; *Rathbun v. Citizens Steamboat Co.*, 76 N. Y. 376, 32 Am. Rep. 321; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575.

⁴⁰ *Western Transp. Co. v. Newhall*, 24 Ill. 406, 76 Am. Dec. 760; *Levering v. Insurance Co.*, 42 Mo. 88, 97 Am. Dec. 320.

control.⁴¹ To this class belong boom companies, organized for the purpose of constructing booms to gather logs on lumber streams; ⁴² custom mills erected for the purpose of grinding and sawing for the neighborhood and generally, whether owned by private individuals or corporations, clothed with the power of eminent domain; ⁴³ public grain elevators for the storage and handling of grain for all owners who may apply; ⁴⁴ stockyards constructed and maintained for the purpose of receiving and handling cattle of divers kinds for whosoever may bring them.⁴⁵

Real Estate Companies.

Another class of quasi public corporations has the purpose to improve, protect, or utilize real estate of divers kinds, and may, for lack of a more fitting name, be called real estate companies, though they are generally organized with special reference to water. In this class are included irrigation companies, whose business is to build canals for supplying arid lands with water for irrigation; ⁴⁶ levee companies, chartered and main-

⁴¹ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *Cotting v. Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *Lawler v. Boom Co.*, 56 Me. 443.

⁴² *Genesee Fork Imp. Co. v. Ives*, 144 Pa. 114, 22 Atl. 887, 13 L. R. A. 427; *Patterson v. Boom Co.*, 3 Dill. 466, Fed. Cas. No. 10,829; *Lawler v. Boom Co.*, 56 Me. 443; *Weaver v. Boom Co.*, 28 Minn. 534, 11 N. W. 114.

⁴³ *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235, 73 S. W. 496; *Harding v. Goodlet*, 3 Yerg. (Tenn.) 41; *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457; *Burlington Tp. v. Beasley*, 94 U. S. 310, 24 L. Ed. 161; *Stout v. McAdams*, 2 Scam. (Ill.) 67, 33 Am. Dec. 441. Cf. *Boston & R. Mill-Dam Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622.

⁴⁴ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77.

⁴⁵ *Cotting v. Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

⁴⁶ *Sand Creek Lateral Irr. Co. v. Davis*, 17 Colo. 326, 29 Pac. 742; *Umatilla Irr. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *San Diego Land & Town Co. v. Jasper (C. C.)* 110 Fed. 702; *Wyatt v. Larimer & Weld Irrigation Co.*, 1 Colo. App. 480, 29 Pac. 906; *Price v. Irrigating Co.*, 56 Cal. 431; *Wheeler v. Irrigation Co.*, 10 Colo. 582.

tained to build levees along rivers to protect lowlands from inundation;⁴⁷ and drainage companies, which have for their object the draining of swamp lands by ditches or pipe mains, so as to fit them for tillage.⁴⁸ These private companies must not be confused with irrigation, levee, or drainage districts, organized in various states for the same objects, and clothed with public powers of taxation and improvement. Such districts are quasi corporations without charter, having no private qualities or objects.⁴⁹ The companies above named, on the contrary, are private corporations, chartered for public uses, and usually clothed with the power of eminent domain.⁵⁰ To this class also belong mining companies in such states as recognize them to be quasi public corporations. This is the law

17 Pac. 487, 3 Am. St. Rep. 603; *Slosser v. Canal Co.* (Ariz.) 65 Pac. 332.

⁴⁷ *Missouri, K. & T. Ry. Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809, in which it was held that the construction of a levy along the bank of a river is a public use, in aid of which the power of eminent domain may be invoked. See, also, *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318.

⁴⁸ *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Anderson v. Kern's Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Reclamation Dist. v. Turner*, 104 Cal. 334, 37 Pac. 1038.

⁴⁹ *Muskego v. Commissioners*, 78 Wis. 40, 47 N. W. 11; *Elmore v. Commissioners*, 32 Ill. App. 122, Id., 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363; *Hughes v. Board*, 108 La. 146, 32 South. 218; *Board of Directors of St. Francis Levee Dist. v. Bodkin*, 108 Tenn. 700, 69 S. W. 270; *Wabash R. Co. v. Levee Dist.*, 194 Ill. 310, 62 N. E. 679; *In re Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

⁵⁰ *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332; *Cummings v. Peters*, 56 Cal. 593; *Aliso Water Co. v. Baker*, 95 Cal. 268, 30 Pac. 537; *Missouri, K. & T. R. Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809; *McGehee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 907; *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635; *Sand Creek Lateral Irr. Co. v. Davis*, 17 Colo. 326, 29 Pac. 742; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276.

in Nevada⁵¹ and Georgia,⁵² while the contrary rule prevails in Pennsylvania,⁵³ West Virginia,⁵⁴ and California.⁵⁵

Banks.

The business of banking may be carried on for purposes of exchange and deposit by corporations or by private persons. Corporations organized solely as banks of exchange and deposit are strictly private corporations.⁵⁶ The legal status of state banks in antebellum days was the subject of discordant decision. By some of the courts state banks were held to be public corporations⁵⁷ and by others private corporations.⁵⁸ Such institutions were in those days banks of issue and circulation, and presented many delicate and difficult corporate questions for adjudication. Being obsolete, they are no longer of practical interest. All state banks now are banks of exchange and deposit only, and therefore private corporations having none of the attributes necessary to make them quasi public. But national banks, being also banks of issue and circulation, perform important public functions under federal franchises, and are therefore quasi public corporations, and subject to federal regulation and control.⁵⁹

⁵¹ *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 294; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147.

⁵² *Hand Gold Min. Co. v. Parker*, 59 Ga. 419.

⁵³ *Appeal of Waddell*, 84 Pa. 90.

⁵⁴ *Valley City Salt Co. v. Brown*, 7 W. Va. 191.

⁵⁵ *Consolidated Channel Co. v. Railroad Co.*, 51 Cal. 269.

⁵⁶ *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Allen v. Clayton*, 63 Iowa, 11, 18 N. W. 663, 50 Am. Rep. 716; *State v. Simonton*, 78 N. C. 57.

⁵⁷ *Cleaveland v. Stewart*, 3 Ga. 283.

⁵⁸ *Bank of State v. Gibbs*, 3 McCord (S. C.) 377; *State Bank v. Clark*, 8 N. C. 36; *Bank of State v. Gibson's Adm'rs*, 6 Ala. 814; *UNITED STATES BANK v. BANK*, 9 Wheat. 904, 6 L. Ed. 244.

⁵⁹ *Davis v. Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700; *McClellan v. Chipman*, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461.

Evolution.

The foregoing is not intended to include all quasi public corporations. An accurate enumeration is hardly possible. The courts do not agree upon what is a public use. The increase in number and variety of corporations is phenomenal. Business activity is vigorous and multiform. Sovereign states strive in strenuous competition to sell charters of incorporation for "any lawful business" to eager purchasers, whether resident or nonresident. Interstate comity is liberal and indulgent. Corporate combination constantly transgresses the bounds of the law. Public utilities multiply, and nonresident capitalists control them. A suspicious public demands protection against corporate power by public regulation. Federal and state statutes and municipal ordinances are the response, and manifold litigation the consequence. The law of quasi public corporations is in evolution. The federal tribunals have been signal exponents of this during the quarter century from the Granger Cases⁶⁰ to the Merger Case.⁶¹ The supposedly lawful of last year may be unlawful next year. The private corporation of yesterday may find itself to-morrow a quasi public corporation, and as such subject to such measure of reasonable regulation as may be necessary to insure the public safety and promote the public welfare.

⁶⁰ *MUNN v. ILLINOIS*, 94 U. S. 113, 24 L. Ed. 77; *CHICAGO, B. & Q. R. CO. v. IOWA*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Railroad Co.*, 94 U. S. 176, 24 L. Ed. 97.

⁶¹ *NORTHERN SECURITIES CO. v. UNITED STATES*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

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